Deutscher Bundestag **Drucksache 17/8000**

17. Wahlperiode 30. 11. 2011

Beschlussempfehlung und Bericht

des Rechtsausschusses (6. Ausschuss)

zu der Unterrichtung
– Drucksache 17/7713 Nr. A.5 –

Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht
KOM(2011) 635 endg.; Ratsdok. 15429/11

hier: Stellungnahme gemäß Protokoll Nr. 2 zum Vertrag über die Europäische Union und zum Vertrag über die Arbeitsweise der Europäischen Union (Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit)

A. Problem

Die Europäische Kommission hat am 11. Oktober 2011 einen auf Artikel 114 des Vertrages über die Arbeitsweise der Europäischen Union (AEUV) gestützten Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht vorgelegt. Nach Ansicht der Kommission hindere das von Mitgliedstaat zu Mitgliedstaat unterschiedliche Vertragsrecht Unternehmen – insbesondere kleine und mittlere Unternehmen – daran, innerhalb der EU Geschäfte über Staatsgrenzen hinweg zu tätigen. Unternehmen müssten sich zur Aufnahme grenzüberschreitender Geschäftsbeziehungen an das jeweils anwendbare Vertragsrecht anpassen; dies sei regelmäßig mit zusätzlichen Transaktionskosten verbunden. Der Verordnungsentwurf solle dagegen den Binnenmarkt durch die Einführung eines eigenständigen und einheitlichen europäischen Kaufrechts, dessen Anwendbarkeit in allen grenzüberschreitenden Geschäften zwischen Unternehmen und zwischen Unternehmen und Verbrauchern vereinbart werden können soll, fördern. Die Kommission geht in Bezug auf den in Artikel 5 des Vertrages über die Europäische Union (EUV) niedergelegten Grundsatz der Subsidiarität und Verhältnismäßigkeit davon aus, dass die zusätzlichen Transaktionskosten und die rechtlichen Komplikationen bei grenzüberschreitenden Geschäften durch den Erlass nicht aufeinander abgestimmter mitgliedstaatlicher Maßnahmen nicht beseitigt werden können. Daher lasse sich das Ziel des Verordnungsvorschlages besser auf Unionsebene verwirklichen.

Die Frist zur Abgabe einer begründeten Stellungnahme gemäß Artikel 6 des dem Vertrag über die Europäische Union und dem Vertrag über die Arbeitsweise der Europäischen Union beigefügten Protokolls Nr. 2 über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit, mit der der Deutsche Bundestag den Präsidenten des Europäischen Parlaments, des Rates und der Kommission darlegen kann, weshalb der Verordnungsvorschlag über

ein Gemeinsames Europäisches Kaufrecht nicht mit dem Grundsatz der Subsidiarität vereinbar ist, läuft bis zum 12. Dezember 2011.

B. Lösung

Kenntnisnahme des Verordnungsvorschlags und Annahme einer Entschließung, mit der in einer begründeten Stellungnahme nach Artikel 6 des dem Vertrag über die Europäische Union und dem Vertrag über die Arbeitsweise der Europäischen Union beigefügten Protokolls Nr. 2 über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit im Wesentlichen dargelegt werden soll, dass

1. der Prüfungsmaßstab der Subsidiaritätsrüge nach Artikel 6 des Protokolls Nr. 2 umfassend zu verstehen ist und neben dem Grundsatz der Subsidiarität im engeren Sinne gemäß Artikel 5 Absatz 3 EUV sowohl die Wahl der Rechtsgrundlage als auch den Grundsatz der Verhältnismäßigkeit gemäß Artikel 5 Absatz 4 EUV umfasst,
2. Artikel 114 AEUV keine tragfähige Rechtgrundlage für den Verordnungsvorschlag ist,
3. die Unterschiedlichkeit der nationalen Vertragsrechtsordnungen die Wirtschaftstätigkeit im EU-Rechtsraum tatsächlich nicht spürbar hemmt,
4. ein einheitliches europäisches Kaufrecht auf Unionsebene daher nicht erforderlich ist,
5. der Verordnungsentwurf die Gefahr birgt, zu größerer Rechtsunsicherheit im europäischen Rechtsraum zu führen und
6. der Verordnungsentwurf aus diesen Gründen nicht mit dem Grundsatz der Subsidiarität zu vereinbaren ist.

Einstimmige Annahme einer Entschließung unter Kenntnisnahme des Verordnungsvorschlags.

C. Alternativen

Absehen von der Annahme der Entschließung.

D. Kosten

Wurden im Ausschuss nicht erörtert.

Beschlussempfehlung

Der Bundestag wolle beschließen,

in Kenntnis der Unterrichtung auf Drucksache 17/7713 Nr. A.5 folgende Entschließung als begründete Stellungnahme gemäß Artikel 6 des dem Vertrag über die Europäische Union und dem Vertrag über die Arbeitsweise der Europäischen Union beigefügten Protokolls Nr. 2 über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit anzunehmen:

„Der Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht (KOM(2011) 635; Ratsdok. 15429/11) ist nach Auffassung des Deutschen Bundestages nicht mit dem Subsidiaritätsprinzip vereinbar.

Der Bundestag verweist auf seine Entschließung zum Grünbuch der Kommission „Optionen für die Einführung eines Europäischen Vertragsrechts für Verbraucher und Unternehmen“ (KOM(2010) 348 endgültig; Ratsdok. 11961/10) auf Drucksache 17/4565. Er bekräftigt seine Überzeugung, dass vor der Implementierung von EU-Regelungen zum Vertragsrecht, insbesondere auch zum Kaufrecht, eine aussagekräftige Folgenabschätzung bezüglich der zu erwartenden rechtlichen Konsequenzen und den faktischen Auswirkungen auf den Markt sowie auf die Verbraucher durchgeführt werden muss.

Begründung:

1. Gemäß Artikel 6 des Protokolls Nr. 2 über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit zum Vertrag über die Europäische Union (EUV) und zum Vertrag über die Arbeitsweise der Europäischen Union (AEUV) können die nationalen Parlamente in einer begründeten Stellungnahme darlegen, weshalb der Entwurf eines Gesetzgebungsakts ihres Erachtens nicht mit dem Subsidiaritätsprinzip vereinbar ist.

   Der Deutsche Bundestag ist der Auffassung, dass der Prüfungsmaßstab, den die nationalen Parlamente insofern anwenden, umfassend zu verstehen ist: Er beinhaltet die Wahl der Rechtsgrundlage, die Einhaltung des Subsidiaritätsprinzips im engeren Sinne gemäß Artikel 5 Absatz 3 EUV sowie den Grundsatz der Verhältnismäßigkeit gemäß Artikel 5 Absatz 4 EUV.

   Die Zuständigkeit der Union nach Maßgabe des Prinzips der begrenzten Einzelermächtigung stellt eine notwendige Vorfrage für die Prüfung der Einhaltung des Subsidiaritätsprinzips dar. Kompetenznormen enthalten häufig Konkretisierungen des Subsidiaritätsprinzips und des Verhältnismäßigkeitsgrundsatzes – eine isolierte Prüfung des Subsidiaritätsprinzips wäre daher oftmals nicht sinnvoll möglich.

   Der Deutsche Bundestag sieht sich in dieser Rechtsauffassung von einem Großteil des juristischen Schrifttums unterstützt (Hans Hofmann, Europäische Subsidiaritätskontrolle in Bundestag und Bundesrat, Das 8. Berliner Forum der Deutschen Gesellschaft für Gesetzgebung (DGG), ZG 2005, 66, (70, 73); Christine Mellein, Subsidiaritätskontrolle durch nationale Parlamente, Eine Untersuchung zur Rolle der mitgliedstaatlichen Parlamente in der Architektur Europas, Baden-Baden, 2007, S. 200 f.; Ingolf Pernice/Steffen Hindelang, Potenziale europäischer Politik nach Lissabon – Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und die Bürger, EuZW 2010, 407 (409); Jürgen Schwarze, Der Verfassungsentwurf des Europäischen Konvents – Struktur, Kernelemente und Verwirklichungschancen, in: ders. (Hrsg.), Der Verfassungsentwurf des Europäischen Konvents, Verfassungsrechtliche Grundstrukturen und wirtschaftsverfassungsrechtliches Konzept, Baden-Baden 2004, S. 489, 522 f.; Elisabeth Wohland,

Bundestag, Bundesrat und Landesparlamente im europäischen Integrationsprozess, Zur Auslegung von Art. 23 Grundgesetz unter Berücksichtigung des Verfassungsvertrags von Europa und des Vertrags von Lissabon, Frankfurt (Main) 2008, S. 201 f.; Alexandra Zoller, Das Subsidiaritätsprinzip im Europäischen Verfassungsvertrag und seine innerstaatliche Umsetzung in Deutschland, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Hrsg.), Jahrbuch des Föderalismus 2005, Baden-Baden 2005, S. 270; Peter Altmaier, Die Subsidiaritätskontrolle der nationalen Parlamente nach dem Subsidiaritätsprotokoll zum EU-Verfassungsvertrag, in: Hans-Jörg Derra (Hrsg.), Freiheit, Sicherheit und Recht, FS für Jürgen Meyer zum 70. Geburtstag, Baden-Baden 2006, S. 314; Marco Buschmann/Birgit Daiber, Subsidiaritätsrüge und Grundsatz der begrenzten Einzelermächtigung, DÖV 2011, 504, (505, 506)).

Auch bei einem Expertengespräch im Unterausschuss Europarecht des Rechtsausschusses des Deutschen Bundestages am 16. Juni 2010 zum Thema „Prüfung des unionsrechtlichen Subsidiaritätsprinzips“ sprach sich die Mehrzahl der Sachverständigen, namentlich Prof. Dr. Christian Calliess, Prof. Dr. Adelheid Puttler, Oliver Suhr, Dr. Joachim Wuermeling und Prof. Dr. Ralph Alexander Lorz, für dieses weite Verständnis der Subsidiaritätsprüfung im Rahmen der Subsidiaritätsrüge aus.

Auch der Bundesrat sieht das Subsidiaritätsprinzip verletzt, wenn die Europäische Union für einen Gesetzgebungsakt keine Kompetenz hat (so z. B. BR-Drucksache 43/10 (Beschluss)).

2. Die Europäische Kommission hat ihren Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht (im Folgenden: Verordnung) am 11. Oktober 2011 beschlossen. Die Kommission stützt die Verordnung auf die Rechtsgrundlage des Artikels 114 AEUV.

   Der Deutsche Bundestag ist der Auffassung, dass Artikel 114 AEUV die Verordnung über ein Gemeinsames Europäisches Kaufrecht als Rechtsgrundlage nicht tragen kann.

   Gemäß Artikel 114 Absatz 1 Satz 2 AEUV erlassen das Europäische Parlament und der Rat die Maßnahmen zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten, welche die Errichtung und das Funktionieren des Binnenmarkts zum Gegenstand haben. Nach Zweck und Inhalt der Verordnung ist eine solche Rechtsangleichung mit der Einführung eines Gemeinsamen Europäischen Kaufrechts jedoch gerade nicht beabsichtigt und kann auch nicht erreicht werden.

   a) Das Gemeinsame Europäische Kaufrecht soll auf freiwilliger Basis auf grenzüberschreitende Verträge Anwendung finden, wenn die Vertragsparteien dies ausdrücklich beschließen. Die einzelnen Vorgaben für die Wahl des Gemeinsamen Europäischen Kaufrechts durch die Vertragsparteien ergeben sich aus den Artikeln 3 ff. der Verordnung. Treffen die Parteien danach keine Vereinbarung über die Anwendung des Gemeinsamen Europäischen Kaufrechts, bleibt es bei der Anwendung des jeweiligen nationalen Rechts nach Maßgabe der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates bzw. sonstiger kollisionsrechtlicher Vorschriften.

      Die nationalen Rechtsvorschriften über Kaufverträge und die sonstigen vom Gemeinsamen Europäischen Kaufrecht umfassten Vertragsarten sollen nach der Verordnung unberührt bleiben. Ausdrücklich wird in Erwägungsgrund 9 der Verordnung festgehalten, dass eine Harmonisierung des Vertragsrechts nicht durch eine Änderung des bestehenden innerstaatlichen Vertragsrechts bewirkt wird, sondern durch Schaffung einer fakul-

tativen zweiten Vertragsrechtsregelung in jedem Mitgliedstaat für in ihren Anwendungsbereich fallende Verträge.

b) In der Rechtsprechung des Europäischen Gerichtshofs ist geklärt, dass ein Gesetzgebungsakt, welcher die bestehenden nationalen Rechtsordnungen unverändert lässt, keine Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten im Sinne des Artikels 114 Absatz 1 AEUV bezweckt (vgl. EuGH, Urteil vom 2. Mai 2006, C-436/03, Parlament ./. Rat, Slg. 2006, I-3733). Gesetzgeberische Maßnahmen, mit denen einheitliche Regelungen für die gesamte Union festgelegt werden, die parallel neben den jeweiligen Vorschriften des nationalen Rechts bestehen und diese lediglich überlagern, können somit nicht auf Artikel 114 AEUV gestützt werden.

Diese Auslegung des Artikels 114 AEUV wird durch einen systematischen Vergleich mit der Rechtsgrundlage des Artikels 118 AEUV bestätigt. Nach dieser mit dem Vertrag von Lissabon eingeführten Bestimmung können im ordentlichen Gesetzgebungsverfahren unter anderem europäische Rechtstitel über einen einheitlichen Schutz der Rechte des geistigen Eigentums in der Union geschaffen werden. Solche Rechtstitel treten parallel neben die entsprechenden Rechtstitel der Mitgliedstaaten, ohne diese zu ändern oder zu ersetzen. Der Vertrag von Lissabon eröffnet der Union also ausschließlich für den begrenzten Bereich der Rechte des geistigen Eigentums eine Kompetenz, legislative Maßnahmen zu erlassen, die parallel neben die mitgliedstaatlichen Regelungen treten. Daraus folgt im Umkehrschluss, dass Artikel 114 AEUV als Rechtsgrundlage für europäische Regelungen in allen sonstigen Bereichen nicht herangezogen werden kann, sofern diese Regelungen parallel neben die nationalen Rechte treten und diese ansonsten unberührt lassen.

Dies entspricht auch der bisherigen Gesetzgebungspraxis der Union: Rechtstitel und Rechtsformen des Unionsrechts, die parallel neben den entsprechenden nationalen Rechtsvorschriften stehen, ohne diese zu ändern und zu ersetzen, sind bislang nicht auf Artikel 114 AEUV, sondern immer auf Artikel 352 AEUV gestützt worden (vgl. etwa die Verordnungen zur Schaffung der Europäischen wirtschaftlichen Vereinigung, der Europäischen Gesellschaft und der Europäischen Genossenschaft). Dasselbe gilt für europäische Verordnungen über das Sortenschutzrecht, die Gemeinschaftsmarke und das Europäische Geschmacksmuster, welche alle das mitgliedsstaatliche Recht ergänzen, aber nicht ersetzen oder angeglichen haben.

In einer öffentlichen Anhörung des Rechtsausschusses des Bundestages am 21. November 2011 haben die Sachverständigen Prof. Dr. Hans Christoph Grigoleit, Dr. Peter Huttenlocher, Prof. Dr. Karl Riesenhuber, Prof. Dr. Wulf-Henning Roth, Prof. Dr. Marina Tamm und Prof. Dr. Gerhard Wagner die Bedenken gegen die Wahl des Artikels 114 AEUV als Rechtsgrundlage der Verordnung bestätigt.

Hier kann allenfalls auf die „Abrundungskompetenz“ des Artikels 352 AEUV rekurriert werden. Diese Rechtsgrundlage sieht jedoch ein anderes Verfahren vor. Gemäß Artikel 352 Absatz 1 AEUV beschließt der Rat einstimmig nach Zustimmung des Europäischen Parlaments. Außerdem darf der deutsche Vertreter im Rat nur zustimmen, nachdem der Bundestag mit Zustimmung des Bundesrates ihn durch ein Gesetz gemäß Artikel 23 Absatz 1 des Grundgesetzes hierzu ermächtigt hat (§ 8 des Integrationsverantwortungsgesetzes).

3. Der Bundestag bezweifelt ferner, dass die Verordnung mit dem Subsidiaritätsprinzip im engeren Sinne und dem Verhältnismäßigkeitsgrundsatz im Einklang steht.

   a) Nach Artikel 5 Absatz 3 EUV wird die Union in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten nicht ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs und ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind.

      Ein Handeln auf Unionsebene setzt voraus, dass die verfolgten Ziele mit dieser konkreten Maßnahme überhaupt sinnvoll erreicht werden können. Die Kommission beruft sich auf Hindernisse für den grenzüberschreitenden Handel, die auf die Unterschiedlichkeit der Vertragsrechte in den Mitgliedstaaten zurückzuführen seien.

      Der Deutsche Bundestag bezweifelt, dass die unterschiedlichen Vertragsrechte in den Mitgliedstaaten die Wirtschaftstätigkeit im europäischen Rechtsraum tatsächlich spürbar hemmen. Dabei kann auf die Erfahrungen mit dem UN-Kaufrecht (United Nations Convention on Contracts for the International Sale of Goods) verwiesen werden. Sie zeigen, dass insbesondere Sprachbarrieren und räumliche Entfernung die entscheidenden Hindernisse für grenzüberschreitende Wirtschaftstätigkeit sind. Dies gilt für Verbraucher wie für Unternehmen gleichermaßen, wie durch die Stellungnahmen von Verbraucher- und Wirtschaftsverbänden belegt wird.

      Ist die Varianz der Vertragsrechtsordnungen also nur von untergeordneter Bedeutung im grenzüberschreitenden Handelsverkehr, so fehlt es an einem Bedarf für ein Gemeinsames Europäisches Kaufrecht und damit an der Erforderlichkeit der Maßnahme im Sinne des Artikels 5 EUV.

      Des Weiteren steht die Erreichung der Ziele auch deswegen in Zweifel, weil wesentliche Fragen im Zusammenhang mit dem Zustandekommen eines wirksamen Vertrages nicht im Gemeinsamen Europäischen Kaufrecht geregelt sind, sondern weiterhin dem innerstaatlichen Recht unterliegen, das nach Maßgabe der Verordnungen (EG) Nr. 593/2008 und (EG) Nr. 864/2007 oder nach sonstigen einschlägigen Kollisionsnormen anwendbar ist (Erwägungsgrund Nr. 27). Hiervon betroffen sind wichtige Fragen wie die Rechtspersönlichkeit, Ungültigkeit des Vertrages wegen Geschäftsunfähigkeit, Stellvertretung, Rechts- und Sittenwidrigkeit des Vertrages, Abtretung, Aufrechnung, Gläubiger- und Schuldnermehrheit und der Parteiwechsel. Vor diesem Hintergrund werden die Parteien entgegen Erwägungsgrund Nr. 8 nicht die Möglichkeit haben, ihren Vertrag auf der Grundlage eines einzigen, einheitlichen Vertragsrechts zu schließen. Daher wird die Rechtsunsicherheit und -unklarheit durch unterschiedliche Vertragsrechtsordnungen im Binnenmarkt für die Rechtsanwender durch das Gemeinsame Europäische Kaufrecht gerade nicht beseitigt, sondern eher noch vergrößert.

      Der Bundestag sieht darüber hinaus auch im Bereich der von der Verordnung umfassten Regelungen die Gefahr erheblicher Rechtsunsicherheit, die beträchtliche Bedenken gegen die Erreichbarkeit der Ziele der Verordnung begründet. Das Gemeinsame Europäische Kaufrecht kann naturgemäß nur allgemeine gesetzliche Regelungen zur Verfügung stellen, die zudem zahlreiche unbestimmte Rechtsbegriffe enthalten. Das Vertragsrecht in Deutschland wie auch in anderen Mitgliedstaaten ist aber wesentlich durch Richterrecht geprägt. Die überwiegende Zahl der für die Parteien relevanten Regeln wird daher aufgrund einer konkretisierenden und rechtsschöpfenden Anwendung durch die Gerichte erst zu schaffen sein.

Dies zeigt die Entwicklung der nationalen Vertragsrechtsordnungen in Europa deutlich. In der Union gibt es jedoch keine einheitliche Zivilgerichtsbarkeit, durch die das Rechtssicherheit erzeugende Regelungsgeflecht geschaffen werden kann. Der Europäische Gerichtshof ist von seiner Funktion und Struktur nicht zur Sicherung der Rechtseinheit in der Lage. Überdies würde ein solcher Prozess – wie wiederum der Vergleich der Entwicklungen der nationalen Rechtsordnungen zeigt – lange Jahre, wenn nicht Jahrzehnte in Anspruch nehmen, wie auch die Sachverständigen im Rahmen der Anhörung am 21. November 2011 unterstrichen haben. Zeit, in der entgegen der Zielsetzung der Kommission nicht mehr, sondern weniger Rechtssicherheit herrschen würde. In dieser Zeit würde der grenzüberschreitende Handel nicht gefördert, sondern vielmehr wegen dieser Rechtsunsicherheit und der einhergehenden höheren Transaktionskosten gehemmt.

b) Nach Artikel 5 Absatz 4 EUV gehen die Maßnahmen der Union nach dem Grundsatz der Verhältnismäßigkeit inhaltlich wie formal nicht über das zur Erreichung der Ziele der Verträge erforderliche Maß hinaus.

Aus den unter Buchstabe a genannten Gründen sieht der Bundestag auch den Verhältnismäßigkeitsgrundsatz nicht gewahrt, weil bereits Zweifel an der Eignung des Vorschlags zur Erreichung der gesetzten Ziele bestehen."

Berlin, den 30. November 2011

Der Rechtsausschuss

Siegfried Kauder (Villingen-Schwenningen)
Vorsitzender

Dr. Jan-Marco Luczak
Berichterstatter

Dr. Eva Högl
Berichterstatterin

Burkhard Lischka
Berichterstatter

Marco Buschmann
Berichterstatter

Raju Sharma
Berichterstatter

Ingrid Hönlinger
Berichterstatterin

Bericht der Abgeordneten Dr. Jan-Marco Luczak, Dr. Eva Högl, Burkhard Lischka, Marco Buschmann, Raju Sharma und Ingrid Hönlinger

I. Überweisung

Der Verordnungsvorschlag auf **Ratsdokument 15429/11** wurde mit Überweisungsdrucksache 17/7713 Nr. A.5 vom 14. Oktober 2011 gemäß § 93 Absatz 5 der Geschäftsordnung dem Rechtsausschuss zur federführenden Beratung sowie dem Ausschuss für Wirtschaft und Technologie, dem Ausschuss für Ernährung, Landwirtschaft und Verbraucherschutz, dem Ausschuss für Tourismus und dem Ausschuss für die Angelegenheiten der Europäischen Union zur Mitberatung überwiesen.

II. Stellungnahmen der mitberatenden Ausschüsse

Der **Ausschuss für Wirtschaft und Technologie** hat die Vorlage in seiner 56. Sitzung am 30. November 2011 beraten und empfiehlt einstimmig die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung.

Der **Ausschuss für Ernährung, Landwirtschaft und Verbraucherschutz** hat das die Vorlage in seiner 56. Sitzung am 30. November 2011 beraten und empfiehlt einstimmig die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung.

Der **Ausschuss für Tourismus** hat die Vorlage in seiner 44. Sitzung am 30. November 2011 beraten und empfiehlt mit den Stimmen der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN bei Stimmenthaltung der Fraktion DIE LINKE., in Kenntnis der Unterrichtung auf Drucksache 17/7713 Nr. A.5 die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung.

Der **Ausschuss für die Angelegenheiten der Europäischen Union** hat die Vorlage in seiner 51. Sitzung am 30. November 2011 beraten und mit den Stimmen der Fraktionen CDU/CSU, FDP und BÜNDNIS 90/DIE GRÜNEN gegen die Stimmen der Fraktion der SPD bei Stimmenthaltung der Fraktion DIE LINKE. festgestellt, dass der Verordnungsvorschlag nicht mit dem Subsidiaritätsprinzip vereinbar sei. Der Ausschuss hat unterstrichen, der Maßstab für die Prüfung der Subsidiarität durch die nationalen Parlamente umfasse die Wahl der Rechtsgrundlage, die Einhaltung des Subsidiaritätsprinzips im engeren Sinne (Artikel 5 Absatz 3 EUV) sowie den Grundsatz der Verhältnismäßigkeit (Artikel 5 Absatz 4 EUV). Der von der Kommission herangezogene Artikel 114 AEUV könne den Verordnungsvorschlag nicht tragen. In der bisherigen Praxis seien Unionsrechtsakte, die neben entsprechende nationale Rechtsvorschriften treten sollten, ohne diese zu ändern oder zu ersetzen, auf die „Flexibilitätsklausel“ des Artikels 352 AEUV gestützt worden. Der Ausschuss bezweifelt auch die Vereinbarkeit des Verordnungsentwurfs mit dem Grundsatz der Subsidiarität im engeren Sinne und mit dem Grundsatz der Verhältnismäßigkeit.

III. Beratungsverlauf und Beratungsergebnisse im federführenden Ausschuss

Der Rechtsausschuss hat den Verordnungsvorschlag in seiner 65. Sitzung am 9. November 2011 anberaten und beschlossen, eine öffentliche Anhörung durchzuführen, die er – nach vorbereitenden Beratungen im Unterausschuss Europarecht – in seiner 67. Sitzung am 21. November 2011 durchgeführt hat. An dieser Anhörung haben folgende Sachverständige teilgenommen:

Gerd Billen	Vorstand Verbraucherzentrale Bundesverband e. V., Berlin
Prof. Dr. Hans Christoph Grigoleit	Ludwig-Maximilians-Universität München (LMU) Juristische Fakultät Lehrstuhl für Bürgerliches Recht, Handels- und Gesellschaftsrecht, Privatrechtstheorie
Dr. Peter Huttenlocher	Bundesnotarkammer, Berlin
Prof. Dr. Karl Riesenhuber	Ruhr-Universität Bochum Juristische Fakultät
Prof. Dr. Wulf-Henning Roth, LL.M. (Harvard)	Rheinische Friedrich-Wilhelms-Universität, Bonn Institut für Internationales Privatrecht und Rechtsver gleichung
Prof. Dr. iur. Reiner Schulze	Westfälische Wilhelms-Universität Münster Institut für Rechtsgeschichte
Christian Steinberger	Verband Deutscher Maschinen- und Anlagenbau (VDMA), Frankfurt am Main
Prof. Dr. Marina Tamm	Hochschule Wismar Fakultät für Wirtschaftswissenschaften
Prof. Dr. Gerhard Wagner, LL.M. (Chicago)	Universität Bonn Fachbereich Rechtswissenschaft Institut für Deutsches und Internationales Zivilrecht

Hinsichtlich des Ergebnisses der Anhörung wird auf das Protokoll der 67. Sitzung mit den anliegenden Stellungnahmen der Sachverständigen verwiesen.

Der **Rechtsausschuss** hat in seiner 68. Sitzung am 30. November 2011 die Prüfung der Einhaltung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit abgeschlossen und empfiehlt in Kenntnis der Unterrichtung auf Drucksache 17/7713 Nr. A.5 einstimmig die Annahme der aus der Beschlussempfehlung ersichtlichen Entschließung.

Berlin, den 30. November 2011

Dr. Jan-Marco Luczak Berichterstatter	**Dr. Eva Högl** Berichterstatterin	**Burkhard Lischka** Berichterstatter
Marco Buschmann Berichterstatter	**Raju Sharma** Berichterstatter	**Ingrid Hönlinger** Berichterstatterin



COUNCIL OF THE EUROPEAN UNION

Brussels, 13 October 2011

Interinstitutional File: 2011/0284 (COD)

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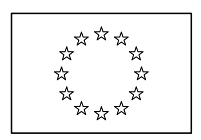
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Brussels, 11.10.2011
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COMMISSION STAFF WORKING PAPER

Impact Assessment

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

on a Common European Sales Law

{COM(2011) 635 final}
{SEC(2011) 1166 final}

Disclaimer

This impact assessment report commits only the Commission's services involved in its preparation and the text is prepared as a basis for comment and does not prejudge the final form of any decision to be taken by the Commission.

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1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Policy Background

The European Commission (Commission) has been working on European contract law since 2001 (see Annex I). With its 2001 Communication on European contract law,[1] the Commission launched a process of extensive public consultation on the problems arising from differences between Member States' contract laws and on potential actions in this field. As a follow-up, the Commission issued an Action Plan in 2003,[2] with a proposal among others to establish a Common Frame of Reference containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. Via a grant under the 6th Framework Programme for Research, the Commission financed the work of an international academic network which carried out the preparatory legal research. This research work was finalised at the end of 2008 and led to the publication of the Draft Common Frame of Reference[3] as an academic text.[4] In parallel to this, analytical work was also carried out by the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Legislation Comparée drafting the *Principes Contractuels Communs*.[5]

In July 2010 the Commission launched a 'Green Paper on policy options on progress towards a European contract law for consumers and businesses' (Green Paper)[6]. The Commission's Work Programme for 2011[7] provides for a legal instrument of European contract law as a strategic initiative to be proposed in the last quarter of 2011.

1.2. Organisation and timing

The Commission adopted a Decision[8] on 26 April 2010 to establish an Expert Group (EG) to conduct a feasibility study on a draft European contract law instrument covering the life-cycle of a contract. The EG was composed of European legal scholars, legal practitioners and representatives of consumer and business organisations (acting in their personal capacity). The backgrounds of the EG members also reflected the main legal systems and traditions within the EU. The EG study (completed in April 2011) served as a starting point for developing the Commission proposal on a possible legal instrument of European contract law.

An Impact Assessment Steering Group (IASG) was set up in May 2010 and was composed of the SG, the SJ, DG COMP, DG COMM, DG ECFIN, DG MARKT, DG ENTR, DG SANCO, DG INFSO, DG MOVE and DG TRADE. The IASG met 5 times and was consulted on the draft Green Paper, on the impact assessment (IA) report as well as on the EG study.

1 Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398, 11.7.2001.

2 Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law: an Action Plan, COM(2003) 68, 12.2.2003.

3 Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Munich, Sellier, 2009.

4 Although financed by the Commission, the text is not an official Commission document.

5 Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds.), European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules.

6 Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final, 1.7.2010.

7 Commission's Work Programme for 2011, COM(2010) 623 final of 27.10.2010.

8 Commission Decision 2010/233/EU, OJ 105 of 27.4.2010.

1.3. Consultation and expertise

1.3.1. Public consultation

The Commission organised the following public consultations throughout the IA process:

- **General consultations**

- The **Green Paper** opened an EU wide public consultation on 7 policy options which closed on 31 January 2011 and resulted in 320 responses from all categories of stakeholders from across the EU, demonstrating the high interest in the topic.[9]

Many respondents saw value in option 1 (the publication of the work of the EG) and supported option 2 (a 'toolbox' for the EU legislator). There was little support for options 3 (a Commission Recommendation), 5 (a minimum harmonisation Directive) and 7 (a Regulation establishing a European civil code). On option 4 (an optional instrument of European contract law) the responses were more varied. Several Member States (MS) and a number of other respondents (business representatives, legal practitioners and academics) said they could support an optional instrument, provided that it fulfilled certain conditions (e.g. a high level of consumer protection, user-friendly nature, clear link with the proposed Consumer Rights Directive (CRD) and other EU-legislation). Many MS and business representatives did not want to take a position at that time, because they did not know the details of the option and the work of the Expert Group. The European Economic and Social Committee adopted an opinion in which it favoured a hybrid option by means of a 'toolbox' and an optional regulatory regime.[10] In a Resolution adopted on 8 June 2011 the European Parliament (EP) also took a position on the Green Paper options. The EP supported an optional instrument, which would make the internal market more efficient without affecting MS' national systems of contract law. This optional instrument could be complemented by a toolbox endorsed by means of an inter-institutional agreement.[11] Some respondents expressed a preference for option 6 (a Regulation establishing a European contract law that would replace MS' national contract laws).

Of those respondents who commented on the scope of a potential European contract law instrument most only expressed opinions on a toolbox (option 2) and an optional instrument (option 4). The majority of those who explicitly commented on the toolbox scope (option 2) believed that it should be broad and comprehensive (i.e. not restricted to certain types of contract). The majority of those who commented explicitly on the scope of option 4 seemed in favour of an instrument which focused on cross-border B2C sales contracts. The EP favoured an optional instrument for both B2C and B2B contracts, for cross-border situations in the first instance.[12]

Based on the responses of critical stakeholders several specific and general concerns relating to the creation of a European contract law, in particular in the form of an optional instrument could be identified. A number of MS were concerned about businesses taking advantage of the weaker position of the consumer/SME, the reduction of the consumer protection level and legal uncertainty. On one hand, a number of business representatives were concerned about the increased legal uncertainty, safeguarding the freedom of contract and an unbalanced high level of consumer protection. On the other hand, consumer representatives feared a reduction of consumer protection

9 An overview of the responses can be found in Annex I on Procedural Issues and Consultation (Annex I).

10 Opinion of the European Economic and Social Committee on the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses of 19 January 2011, OJ C 84/1, 17.3.2011.

11 European Parliament Resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013 (INI)).

12 European Parliament Resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses (2011/2013 (INI)).

levels in their MS and insisted that any new instrument in the field of consumer policy should have a clear added value for consumers. They also expressed a specific concern relating to the optional instrument which they thought would lead to uncertainty and confusion for consumers. Some associations of legal practitioners were concerned about an increase of legal complexity and uncertainty, largely due to the lack of accessible case law.

In order to meet as much as possible the abovementioned concerns, the Commission created a special sub-group within the EG focusing on ensuring a high level of consumer protection. In order to discuss the balance of the level of consumer protection with the needs of business this parameter was given particular attention in the discussion with both consumer and business representatives as part of the key stakeholder experts group (see below). In addition, the Commission made clear that they intended to minimise the legal uncertainty by establishing a European database of relevant case-law accessible by legal practitioners from all MS.

- A **key stakeholder experts group** was set up in July 2010 which represented businesses, consumers and legal practitioners. The first role of the stakeholder group (which met 10 times) was to provide a practitioner's perspective on the work of the EG, thereby ensuring the instrument developed was user-friendly. In addition to this, the stakeholder group discussed IA related matters at half of its meetings, once the formal IA work began.

- The Commission published the **feasibility study of the Expert Group** on its web-site and invited stakeholders to provide feedback between 3 May and 1 July 2011.[13] The Commission consulted stakeholders on the text in order to decide if and to what extent it could serve as a starting point for the preparation of a political follow-up initiative. Most contributions concerned precise questions of legal drafting. However, business stakeholders in particular also expressed concerns about the negative effects of a level of consumer protection, which according to them was too high.[14] Reacting to these concerns, the Commission ensured that the level of consumer protection would be balanced.

- **Specific consultations targeting main stakeholder groups**

- Workshops and meetings: A workshop on contract law with business stakeholders was organised in November 2010. Commission officials also met representatives of BEUC and attended two meetings of the European Consumer Consultative Group (ECCG).

- Surveys: Several surveys consulted businesses on their experiences with contract law related problems and the impacts of a European contract law instrument. They included two Flash Eurobarometers (EB 320/2011 and 321/2011),[15] the SME Panel[16] and the European Business Test Panel[17] surveys of 2010.A consumer survey (Flash Eurobarometer 299a) enquired about consumer experiences with cross-border shopping and problems related to contract law.

1.3.2. Outside expertise

In November 2010 the Commission awarded a public tender to IBF International Consulting for a study supporting the IA preparation. The draft report was submitted in spring 2011.

13 The Feasibility Study of the Expert Group is available at: http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

14 Responses to the public consultation on the Expert Group feasibility study by business stakeholders, such as: Business Europe, p.2-3; Eurochambres, p. 1; UEAPME, p.2, and legal practitioners stakeholders, such as: Council of Bars and Law Societies of Europe (CCBE) , p.3.

15 Eurobarometers 320 on European contract law in business-to-business transactions (EB 320) and Eurobarometer 321 on European contract law in consumer transactions (EB 321) of 2011.

16 The SME Panel survey was conducted within the Enterprise Europe Network and gathered responses from 1,047 micro, small and medium sized businesses.

17 The European Business Test panel Survey (EBTP) attracted responses from 378 companies of all sizes.

1.3.3. Consultation of the Impact Assessment Board

The IA report was examined by the Commission's Impact Assessment Board (IAB) on 19th July 2011. The IAB evaluated the IA report positively, considered its structure adequate and recommended several aspects to be improved, in particular by including more detailed explanations from the annexes into the main report. All these recommendations have been addressed: For instance, the existing legal framework was presented in more detail in this report and Annex II and the technical assumptions of economic impacts were explained in the main text of the report, in addition to Annexes III and IV.

2. PROBLEM DEFINITION

2.1. Introduction

Differences in contract law between MS create a barrier to trade within the internal market. This discourages some companies from trading cross-border and limits consumer choice. Analysis carried out in this IA suggests that each year those companies that do export into new MS markets face unnecessary entry (transaction) costs of about €1 billion (bn). The value of the trade foregone each year between MS due to differences in contract law amounts to some tens of billions of euros.

2.2. Current EU legal framework in the area of contract law

The current legal framework in the EU does not contain a single set of uniform and comprehensive contract law rules which could be used by consumers and businesses in cross-border trade. Historically laws have been created each time to meet the specific needs at the time. This has led to the current patchwork of European legislation. There are only a limited number of uniform rules in only a few areas of contract law. As a result, substantial differences between MS contract laws remain. These differences are seen as a barrier to cross-border trade[18] by business with a slightly higher impact on B2C transactions than in B2B transactions.[19]

Conflict of law rules: In order to improve legal certainty, the Union put in place *uniform conflict of law* rules. The Rome I Regulation[20] allows contracting parties to choose which law applies to their contract and to determine which law applies in the absence of choice.[21] For B2C contracts where a business directs its activity to the consumer's country of residence the business may either apply the consumer's national law in its entirety or choose another law, in practice mostly the trader's law. However, in the latter case it needs to make sure it complies with the mandatory consumer protection provisions stemming from the consumer's national law, whenever they provide a higher protection. Nevertheless, uniform conflict of law rules do not remove the differences between substantive contract law. They only lead to the application of a given substantive national law in cross-border transactions when otherwise several different national laws could potentially apply.

18 See, for example, EB 320 and EB 321 of 2011, 32% in B2B (p. 16) and 36% in B2C, (p. 20) of exporting businesses said that contract law difficulties were a barrier to cross border trade and were almost equally cited as other practical barriers such as language and delivery. More data available in SME Panel and EBTP surveys.

19 EB 320, p. 16: 32% of companies engaged in cross-border B2B transactions considered contract law as a barrier; and EB 321, p. 20: 36% of companies engaged in cross-border B2C transactions considered contract law as a barrier.

20 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

21 Regulations (EC) of the European Parliament and of the Council No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and 864/2007 on law applicable in non-contractual obligations (Rome II).

This means that no matter what law has been chosen – for one of the parties to a contract the applicable law is always a foreign law. This party is therefore disadvantaged by the need to familiarise itself with a different legal system. This situation particularly disadvantages consumers who are confronted with different laws when pro-actively shopping cross-border. Furthermore, businesses are disadvantaged by additional costs they incur when they have to ensure compliance with the consumers' mandatory rules in B2C cross-border transactions. Businesses which agree to apply a foreign law in B2B contracts also incur additional costs.

Substantive rules: The EU has partially reduced the differences between the MS' substantive laws by setting *substantive rules* through harmonisation measures. Table 1 below illustrates key areas of contract law which cover the life-cycle of a contract.[22] It shows that the existing *acquis* and international rules are limited in scope: out of the 13 key contract law areas they only cover six areas (one only partially) for B2C and eight areas for B2B contracts (one only partially). Thus, a comprehensive set of uniform rules is neither available in B2C nor B2B cross-border sales.

Table 1: EU Legal Framework in the area of contract law

Business-to consumer contracts				**Business-to-business contracts**		
Contract law area	**Consumer rights Directive[23]**	**Other relevant EU consumer legislation**	**Directive on electronic commerce**	**Directive on electronic commerce**	**Directive on combating late payments**	**Vienna Convention on the international sale of goods**
Pre-contractual information and negotiation	YES	YES	YES	YES	NO	NO with a few exceptions
Conclusion of contract	NO	NO	YES (partially)	NO	NO	YES
Rights to withdraw	YES	YES	NO	NO	NO	NO
Defects in consent	NO	NO	NO	NO	NO	NO
Interpretation	NO	NO (with one exception)	NO	NO	NO	YES
Contents and effects	NO	NO	NO	NO	NO	NO with a few exceptions
Unfair contract terms	NO	YES	NO	NO	YES (partially)	NO
Obligations and remedies of the parties to a sales contract	NO	YES	NO	NO	NO	YES
Delivery and Passing of Risk	YES	NO	NO	NO	NO	YES
Obligations and remedies of the parties to a related service contract	NO	NO	NO	NO	NO	NO
Damages, Stipulated payments for non-performance and interest	NO	NO	NO	NO	YES (partially)	YES
Restitution	NO	NO	NO	NO	NO	YES
Prescription	NO	NO	NO	NO	NO	NO

For B2C related transactions, the EU legal framework contains mainly minimum harmonisation rules in selected areas of consumer contract law. These have been introduced among others by the

22 The Expert Group created by the Commission identified these areas as key areas of contract law for cross-border contracts.

23 The table reflects the scope of the CRD based on the text, which was adopted at first reading. The scope is limited to distance and off-premises B2C contracts.

Directives relating to doorstep selling,[24] unfair contract terms,[25] distance selling[26] and sales remedies.[27] Even though these Directives have substantially improved the level of consumer protection in the EU, they have not removed the differences between MS laws. While they establish minimum standards for certain core consumer rights, such as unfair contract terms control and sales remedies, MS can build upon these to various degrees and adopt legislation which goes beyond the standards of these Directives. Furthermore, MS can legislate freely in areas where no harmonisation had taken place. As MS legislate in an un-coordinated manner the consumer contract laws across the EU have developed into a patchwork of 27 sets of different rules. Although this legal framework ensures an adequate level of protection for consumers who shop in their own country, it creates increased complexity and confusion for pro-active consumers who shop cross-border. It also creates increased complexity and costs for businesses interested in selling to consumers across border.

The Commission addressed the differences in the MS consumer contract laws by its 2008 proposal for a CRD. The aim was to facilitate cross-border shopping and sales. This would have been achieved by establishing a single set of rules through full harmonisation of key regulatory aspects for consumer contracts. The 2008 proposal originally set out to merge the four consumer contract law Directives on doorstep selling, unfair contract terms, distance selling and sales remedies.

However, the CRD did not achieve the objective of the initial proposal, as its scope was substantially reduced in the negotiations during the legislative process. Two modules which were essential in practical terms, the rules on unfair contract terms and sales remedies, were excluded. Thus, key issues which posed serious concerns to consumers in cross-border shopping, such as their rights and obligations with respect to defective products, remained regulated at different levels across MS. Although successful, the outcome of the negotiations on the CRD showed therefore that the full harmonisation approach in those areas of consumer contract law had limits. The CRD succeeded in creating fully harmonised substantive rules, but only for distance and off-premises contracts and even then these were limited to the areas of pre-contractual information, withdrawal and delivery/passing of risk. Placing this in context, these are only 3 out of 13 key areas of contract law mentioned in Table 1. Thus, the rules for B2C contracts in the remaining 10 areas are harmonised either at a minimal level or not harmonised at all.

For B2B contracts the existing EU rules are even more limited: The Directive on Electronic Commerce[28] introduced some rules on pre-contractual information for electronic contracts. The Directive on combating late payments[29] harmonises the rules on the default interest rate which apply in cases of late payment, but allows MS to go beyond the standards of the Directive in favour of the creditor. Thus, the EU *acquis* exists only in 2 out of the 13 key contract law areas, mentioned in Table 1 and also contains rules partially harmonised only at a minimum level.

A set of rules of a broader scope was introduced at an international level by the 1980 UN Convention on the International Sales of Goods (The Vienna Convention). However, the Vienna Convention was not ratified by all MS. It is not applicable in the UK, Ireland, Portugal and Malta. In addition, it does not cover the whole life cycle of a contract comprehensively. For example, it hardly covers any general contract law, while in practice legal disputes about remedies for defective products are often intrinsically linked to general contract law (e.g. interpretation of contracts in order

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24 Council Directive 85/577/EEC of 20 December 1985 aims to protect the consumer in respect of contracts negotiated away from business premises.

25 Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

26 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

27 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

28 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

29 The Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast).

to determine conformity or the question whether a contract is validly concluded despite defects in consent). Finally, there is no mechanism ensuring its uniform application as different national courts may interpret it differently. All these difficulties may contribute to the result that only a relatively small number of companies intentionally use the Vienna Convention.[30]

Table 1 shows the contract law areas where minimally harmonised or uniform rules exist, but also where gaps lead to differences of national contract law regimes. It demonstrates the lack of a uniform and comprehensive set of rules covering the whole life cycle of a contract both for B2C and B2B cross-border transactions. The remaining differences in contract laws continue to generate obstacles to the smooth functioning of the internal market affecting both consumers and businesses, as described further in sections 2.3 and 2.4.

The European contract law as such addresses all the problems that differences in contract laws pose to cross-border trade in the EU. As goods account for the major share of intra-EU trade,[31] the focus of this initiative is on the sale of goods. The economic sectors involved in the sale of goods considered in this report are according to the categorisation of Eurostat mining, manufacturing, wholesale, retail and agriculture. These sectors also include trade in digital products, a sector of growing economic importance.

In addition, some services are intrinsically linked to the cross-border sales of goods because they are provided in close connection to a contract of sale and are agreed with the seller of goods, simultaneously with the sales transaction. These services (e.g. installation, repair or maintenance) are therefore also covered by this initiative.

2.3. Problem 1: Differences in contract law hinder businesses from cross border trade and limit their cross-border operations

Currently on average only 9.3% of the EU companies involved in the sales of goods export inside of the EU.[32] The majority of them (62% in B2B and 57% in B2C) export to no more than 3 other MS.[33] One of the reasons for this relatively low level of cross-border trade – besides a lack of interest in export – is that some companies are hindered by regulatory (e.g. differences in tax regulations, contract law, administrative requirements and company law) and practical barriers (e.g. language, transportation and after-sales maintenance). Recent business surveys show that the regulatory barriers are a greater hindrance to the expansion of cross-border trade than the practical ones.[34] The Commission is tackling the regulatory barriers to cross-border trade with several initiatives.[35] This IA deals exclusively with contract law related barriers.[36]

2.3.1. Negative impact of contract law differences on cross-border trade

30 EB 320, p.57: Only 9% of respondents said they frequently applied international instruments, including the CISG and the UNIDROIT principles.

31 According to Eurostat Statistics in Focus 37/2010 and the Eurostat External and Intra-EU Trade Yearbook of 2009, the intra-EU trade volume in goods was 4 times the volume of trade in services in 2008.

32 See Annex on calculations of transaction and opportunity costs (Annex III).

33 EB 320, p. 55 and 321, p. 56.

34 EB 320 and EB 321, the SME Panel and EBTP surveys. Similarly, a survey by Eurochambres in 2010 found that the differences in legislation were the main difficulty in cross-border trade for 36% of the respondents. It was conducted among 1,330 companies in 12 EU MS and Croatia. 83% of the respondents were involved in B2C transactions while 57% were delivering products cross-border.

35 For instance, a measure on tax barriers aims at improved coordination of the national tax policies by means of a Directive on a common consolidated corporate tax base.

Administrative barriers are tackled by the application of the Services Directive, the Small Business Act and the review of accounting Directives. Measures in the area of company law include a legislative proposal on linking of company registers.

36 This report acknowledges the importance of all existing barriers to cross-border shopping.

According to survey data[37] contract law related barriers rank amongst the top regulatory barriers, which influence the companies' decision to trade cross-border: In B2B transactions 35% of companies involved or interested in cross-border trade and 51% of companies with no cross-border experience were affected by contract law differences. In B2C transactions at least 40% of retailers interested or involved in sales to consumers in other EU countries were affected.

Contract law related barriers hinder cross-border trade in two ways: Firstly, they dissuade some companies from trading cross-border. 61% of companies involved in B2B and 55% in B2C transactions and affected by contract law differences were often or at least occasionally deterred by contract law related barriers. Additionally 3% of companies involved in B2B and 2% in B2C always gave up exports for this reason.[38] Secondly, contract law related barriers lead companies to limit their cross-border operations. Above 80% (both in B2B and B2C transactions) of companies active or interested in cross-border trade and affected by contract law barriers suggested that they exported to fewer EU countries for this reason.

This has impacts at a macroeconomic level, although they are difficult to quantify precisely.[39] Nevertheless, the value of failed intra-EU trade as the result of companies giving up cross-border trade due to contract law only, can be estimated[40] at a range between €26 bn (equivalent to Lithuania's GDP) and €184 bn (slightly more than Portugal's GDP).[41]

These opportunity costs only relate to the lost value of cross-border trade for companies which were dissuaded from cross-border trade due to contract law. While part of these costs will be reduced due to the domestic transactions which may take place instead of the failed cross-border ones,[42] it is hardly possible to quantify the value of the compensatory domestic transactions. However, the domestic trade would most likely take place at a higher price and would therefore disadvantage consumers.

Companies which limit their cross-border activities due to differences in contract law also miss the opportunities of cross-border demand by refusing orders from consumers. At least 23% of exporting European retailers[43] refused orders by consumers from other MS due to differences in contract law.[44] Out of these, 5% refused sales to consumers in other MS systematically and 18% did so occasionally. The overall percentage of EU retailers refusing sales is likely to be much higher, as the majority of them do not export and are thus even more likely to refuse cross-border sales (discussed further in section 2.4.2).

37 Unless otherwise stated, the data in this section comes from EB 320, p. 15 and 321, p.19.

38 These experiences were confirmed by the participants in the SME and EBTP surveys where 47% and 67% of the respondents respectively said that barriers relating to contract law have dissuaded them from cross-border transactions to various degrees. See Annex III.

39 For example, determining the impact of differences in contract law on trade flows requires knowledge about the number of companies that are discouraged from trading cross-border due to these differences, the number of countries with which they would trade, and the amount they would trade. This data is not available.

40 The estimate is based on the answers to Eurobarometer surveys, Eurostat data on intra-EU trade and a number of assumptions. More details are in Annex III.

41 Eurostat Statistical Books, External and Intra-EU trade – a statistical yearbook, 2009 edition, p. 82. The value of forgone intra-EU trade is calculated as a percentage of the actual trade that failed as companies were deterred from cross-border transactions. It is based on the value of total intra-EU trade estimated by Eurostat at €2704 billion in 2008 (see Annex III for details).

42 The estimate does not reflect cross-border trade which failed for other reasons than contract law. It also does not take into account the domestic transactions which could compensate the failed cross-border trade.

43The figure of 23% of retailers who refused cross-border sales only covers the companies which are currently trading cross-border or interested in doing so.

44 EB 321, p. 29.

Econometric research has shown that when two countries have legal systems based on a common origin, there is a positive effect on their bilateral trade.[45] Assuming conservatively that the removal of differences in contract law would contribute 1 percentage point to this positive effect[46], the increase in intra-EU trade could be in the order of magnitude of €30 bn.[47]

2.3.2. Driver 1: Additional transaction costs stemming from differences in contract law hinder cross-border trade

The need to apply different foreign contract laws is likely to generate additional transaction costs[48] compared to domestic trade. Moreover, these costs usually grow proportionately to the number of EU countries a company trades with and thereby hinder trade expansion within the internal market. Indeed, businesses exporting to more MS than average assign a greater importance to differences in contract laws. For instance, whereas about 41% of companies trading with businesses in only one country considered contract law differences a barrier, this figure went up to 55% for those trading with more than 4 countries.[49] Companies' own estimates of their transaction costs for entering one MS range between less than €1000[50] to above €30,000.[51] These are mostly one-off costs that vary depending on the company's business activity, its place of business, distribution channels and type of transaction (B2C or B2B). The cumulative costs for all exporting EU companies are between €6 and €13 bn as explained in the section on cumulative transaction costs for the EU economy below.

Other types of costs in addition to the one-off costs are not taken into account, as comprehensive data on their scale is not available. These other types could include for instance ongoing compliance costs for periodical adaptations to changes in the respective national laws. Business stakeholders have pointed out that these costs could be of a considerable scale and occur annually.[52] Furthermore, additional costs specific to litigation occur when courts have to apply a foreign contract law. These costs stem from the need for translation and expert legal opinions on foreign contract laws in litigation cases.[53]

45 A.Turrini and T. Van Ypersele, Traders, courts and the border effect puzzle, Regional Science and Urban Economics, 40, 2010, p. 82: "Analysing international trade across OECD countries we show that controlling for countries specific factors, distance, the presence of common border and common language […], similar legal systems have a significant impact on trade […]. If two countries share common origins for their legal system, on average they exhibit trade flows 40% larger."

46 Based on the results of EB 320, p. 33, this effect is assumed to range between 0.76% and 1.53%, 1% being an average example that takes into account both extremes. This range is computed as a weighted average of the responses of the traders interviewed. They were asked about the impact of a single European contract law on their cross-border operations. Available replies ranged between a possible decrease to a possible significant increase, and on each of these categories assumptions have been made on the attribution of a weight. For example, "increase a lot" may mean 5% more trade to have a low estimate, or 10% to have a medium one; "increase a little" may mean 1% more trade as a low estimate or 2% as a medium one etc. See details in Annex IV.

47 Intra-EU trade amounts to approximately € 2700 bn in 2008 (Eurostat external and intra-EU trade – a statistical yearbook, 2009 edition), an increase in trade of 0.76%-1.53% would be by consequence equal to € 20.5 – 41.3 bn (€ 30 bn, based on 1%, on average).

48 The references to 'transaction costs' in this report are limited only to the transaction costs for cross-border trade which stem from differences in contract law i.e. for identifying the applicable law, becoming familiar, complying with it and adapting contracts accordingly.

49 EB 320, p. 19.

50 7% of the respondents to the EBTP survey expected costs savings of less than €1,000 per MS entry if a single European contract law was introduced; the majority of 20% expected cost savings between €1,000 and €5 000 and 17% - between €5,000 and €10,000.

51 12% of the respondents to the EBTP survey and 3% of the SME Panel survey respondents expected costs savings of more than €30,000 per MS entry if a single European contract law was introduced.

52 Deutscher Industrie-und Handelskammertag (DIHK), Position Paper on the Feasibility Study carried out by the Expert Group on European contract law, p.2: the annual ongoing costs for compliance could amount to € 25 000.

53 Dr. jur. Thomas U. Klink, LL.M. Judge at Regional Court of Stuttgart, speaker at an EP workshop on European contract law, October 2010 , 'EU contract law as a tool for facilitating cross-border transactions: a point of view from national courts', note, 2010: the litigation costs may result from the need to translate foreign documents in order to introduce them into the legal proceedings and to determine the rules of a foreign law, amongst others by expert opinions.

The additional transaction costs occur for companies when they have to deal with a foreign contract law. To what extent this is the case in practice differs in B2C and B2B transactions as described below.

- ***Costs in B2C transactions***

As part of the transaction costs, in B2C transactions businesses need to bear specific costs to ensure compliance with the mandatory consumer protection rules of the consumer's country of residence. In B2C transactions it is in practice mostly the business which determines the applicable law and can therefore choose a law it is familiar with. Nevertheless, in cross-border B2C transactions which target consumers in other countries, businesses have, at the very least, to ensure compliance with the mandatory consumer protection rules of the consumer's country of residence. The costs may vary in the below described two scenarios. Both these scenarios are derived from Article 6 of the Rome I Regulation.

In the first scenario when a business may choose to apply the consumer's national law in its entirety, the business would bear the whole range of transaction costs stemming from legal advice and adapting standard terms and conditions to a different contract law. In the second scenario, when a business chooses to apply its preferred law, the transaction costs are likely to be slightly lower compared to the first scenario,[54](as the preferred law is in all likelihood a law the business is familiar with). However a business will have, at least, to research whether the level of the mandatory consumer protection rules in the consumer's law is higher and adapt its terms and conditions if this is the case. While there is no data on the preference of choice between these two scenarios, it is more likely that in practice businesses would prefer to operate under their own law, as this would in general be less costly.

38% of companies with experience or an interest in cross-border trade considered the need to adapt and comply with different consumer protection rules in foreign contract laws as a barrier.[55] Businesses with no experience in cross-border trade see these costs as an even greater barrier. While 50% of retailers engaged in cross-border trade considered the extra costs for compliance with consumer protection regulations, including contract law,[56] as important or very important, for those who did not sell cross-border this percentage went up to 66%.[57]

The costs for B2C transactions are estimated as an average for the two above-mentioned scenarios. The average transaction costs per company per MS range between €8,695 and €9,565.These costs are estimated based on companies' responses to a business survey and the range is verified by other sources.[58]

Assuming that all exporting companies carefully examine the applicable foreign law in advance, the cumulative sunk contract law-related costs that must already have been incurred by companies

54 A business would need less legal support, when it applies its own law with possible adjustments.

55 EB 321, p. 62: respectively for 7%, 13% and 18% of the respondents this barrier had a large, some or minimal impact on their decision to trade cross-border.

56 The area of consumer protection and contract law partially overlap, but differ in scope. They overlap to the extent that contract law regulates a number of consumer rights which are key for ensuring consumer protection. However, consumer protection rules also cover other regulatory areas beyond the scope of contract law, such as product safety. Contract law goes beyond the scope of consumer protection, as it contains rules of general contract law and also regulates B2B relations.

57 EB 224 on Business attitudes to cross-border sales and consumer protection, 2008, p. 22-23.

58 The average transaction costs per company per MS are calculated based on the SME Panel survey: See Annex III. The estimate based on the SME Panel is confirmed by other sources. The EBTP survey gives an interval between €11,132 and €14,704 of average transaction costs for both B2C and B2B. According to the calculations of small business representatives (Federation of Small Businesses (FSB) in the UK, Response to the Green Paper on policy options for progress towards a possible European contract law for consumers and businesses; see for detailed explanation Federation of Small Businesses Position Paper on Rome I, p. 3) for an SME engaged in cross-border B2C e-commerce the transaction costs amount to €9,120 of legal and translation costs per MS.

currently active in cross-border B2C trade are between approximately €4 and €9 bn.[59] However, surveys among exporting businesses suggest that in practice not all of them consult a lawyer on foreign law and thus do not incur all transaction costs. Therefore, the cumulative costs are more likely to be lower. They are estimated at between €3.6 and €7.4 bn.[60]

Furthermore, specific contract-law related IT costs may occur for businesses selling online to consumers in other EU countries. These costs are on average €2,916[61] and stem from the need to adapt the business' website to the legal requirements of each MS it directs its activity to.[62] This raises the cumulative contract-law related costs by a range between €0.4 and €0.8 bn.[63]

Therefore, the cumulative contract-law related costs that have been incurred by companies currently active in cross-border B2C trade (legal, IT and translation costs) and on which data is available range between approximately **€4 and €8 bn**. These are sunk costs that cannot be recovered by the retailers who have begun exporting which could alternatively be invested in productive activities.

- ***Costs in B2B transactions***

In B2B transactions companies also bear specific costs of negotiations on applicable law. They are seen as a barrier on average by 30% of companies engaged or interested in cross-border trade.[64] In addition, 44% of companies who are interested, but not yet actively exporting, are concerned about the difficulties relating to negotiations on applicable law.[65]

Example: Difficulties in negotiating applicable law

Mr. Kowalski, the owner of a small Polish company in Radom, develops a uniquely designed organic wooden bed for children. He takes part in a furniture fair in Cracow with a €2,500 participation fee. There his beds attract the attention of two well known German and Italian retailers. Mr. Kowalski's company has the capacity to sell to both retailers and he starts negotiations with both of them.

A few days later, Mr Kowalski contacts Ms Janowska, his company's local lawyer. He sends her both sales contracts in English for legal advice for the agreed price of €750. When examining the contracts, Ms Janowska discovers that they are governed by German and Italian laws respectively. As she is not familiar with either of the two legal systems, she recommends to Mr. Kowalski to use his own standard contract which is governed by Polish law. However, both the German and Italian retailers explain that they are not familiar with Polish law and therefore prefer the contract to be covered by their national law. Ms Janowska advises Mr Kowalski to hire an international law firm to assist him with these contracts. In view of their ongoing business relationship she considerately does not bill him for this advice.

Mr Kowalski contacts an international law firm in Warsaw and learns that they would bill him €5,000 for checking each contract and helping negotiate the terms. This is a significant amount for Mr Kowalski. He has so far invested €2,500 for the participation in the fair and at least two days of his time in contacts with lawyers and his potential clients. He definitely does not want to lose these two deals, but he is frustrated that in order to be aware of his legal rights and obligations he needs to check, for every potential client from another MS another contract law regime. He now has a dilemma: spend an additional €10,000 to be sure of his legal rights and obligations under the contracts or take the risk,

59 The aggregate general one off-costs for B2C transactions can be estimated based on the formula: number of exporting retailers who are likely to consult a lawyer * transaction costs of entering one additional MS * average number of EU countries a business exports to. See Annex III.

60 EB 321, p. 58 found that 18% of retailers currently involved in cross-border trade are not at all informed about the consumer protection provisions in the contract laws of the EU countries where they target consumers. It is reasonable to assume that these exporters have not consulted a lawyer on foreign law at all.; the range of costs is therefore reduced accordingly.

61 Estimates based on the SME Panel survey show that the transaction costs are higher for businesses selling online, compared to face-to-face. While the average transaction costs in B2C are estimated between €8,695 and €9,565, for companies selling online the average costs are €11,875- €13,541. Therefore, both in the high and low estimate the additional costs for e-commerce amount to approximately €2,900. The costs are estimated based on the formula: additional contract law related IT costs * % of retailers exporting through e-commerce * average number of EU countries exported to. See Annex III for detailed methodology of calculations.

62 The costs include adapting the web-site so that it can recognise the consumer's country of residence and retrieve the correct set of pages. See FSB, Response to the Green Paper on policy options for progress towards a possible European contract law for consumers and businesses , p. 3; see FSB Position Paper on Rome I, p. 3.

63 See also Annex III.

64 According to EB 320, p. 61: respectively 5%, 10% and 15% of the respondents considered this was a barrier which impacts their decision to sell cross-border.

65 EB 320, p. 61.

sign the contracts as they stand and hope that no legal problems will arise in future.

For B2B transactions the average transaction costs per company per MS range from €9,000 to €10,658.[66] These costs are estimated based on companies' responses to a business survey and the range is verified by another source.[67]

These transactions costs occur when a business agrees to apply a foreign law to the contract. This usually affects the party with the weaker negotiating power,[68] which is often an SME. In their relations with companies with more bargaining power SMEs may have to agree to apply the law of their business partner. Thus, they bear the transaction costs of finding out about the content and consequences of the foreign law applicable to the contract. In contracts between SMEs of comparable bargaining power the need to negotiate the applicable law may be a significant obstacle for both parties, as none of them may be familiar and willing to accept the law of the other partner.[69] Practically, the most frequently chosen foreign laws are the law of the business partner (14.6%), international legal instruments, including the Vienna Convention (9%), or the law of a third country (0.6%).[70] According to a conservative estimate of B2B transaction costs on the basis of only the 14.6% of companies which most frequently apply the law of their business partner,[71] the cumulative sunk contract-law related costs incurred for B2B trade range between approximately **€2 and €5 bn.**[72] These estimates are used throughout this report. However, if one would also consider the costs of the 9.6% of companies applying the laws of a third country or international instruments the cumulative B2B costs would increase to about €3 to €6 bn.[73]

- ***Cumulative transaction costs for the EU economy (B2C and B2B costs combined)***

The estimate of overall cumulative transaction costs for currently exporting companies in B2C and B2B stemming from fragmentation in national contract law is therefore in the range of **€6-€13 bn**.[74] This estimate is conservative, for the following reasons: Firstly, it is based on the assumption that some companies do not investigate foreign law in advance of exports.[75] For instance, assuming that all B2C exporters would consult a lawyer on the applicable foreign law, the costs would be even higher in the range of about €7 bn and €15 bn. Secondly, the estimate only considers the sunk one-off costs (incurred by the 9.3% of EU businesses which are currently involved in EU cross-border trade in goods) whose scale can be estimated with reasonable certainty and does not include ongoing compliance costs and litigation costs.

66 See Annex III for detailed explanations.

67 The estimate is based on the aggregated data from the SME Panel survey. It is verified by the results of the EBTP panel survey, which give the range of €11,132 – €14,704.

68 EB 320, p. 27: While 24% of respondents said they frequently applied another than their national law, this percentage is likely to be higher as 17% of the respondents were not able to (or did not want to) answer the question: "Which contract law most often governs your business-to-business cross-border transactions in the EU?"

69 See response to the Green Paper by the Scottish Law Commission, p. 5.

70 EB 320, p. 27.

71 It is assumed that the companies which frequently apply the law of their business partner would bear additional transaction costs for each MS they enter

72 The costs are estimated based on the formula: number of exporting businesses * % of companies usually applying the law of their business partner in cross-border transactions * transaction costs of entering one additional MS * average number of EU countries a business exports to. See also Annex III.

73 These 9.6% of companies are likely to pay the transaction costs once, while trading with multiple MS based on the same law, e.g. Common law or Swiss law or the Vienna Convention.

74 See Annex III for detailed explanations on transaction costs.

75 EB 320, p. 57, suggests that 15% of exporting businesses do not know what law applies to their contract and EB 321, p. 58, found that 18% of exporting retailers are not informed at all about consumer protection provisions in the contract laws of the EU countries where they sell to final consumers.

However, more transaction costs for the EU economy occur annually, as new EU exporters (14.6%[76] yearly)[77] pay transaction costs for entering cross-border trade. Thus, the annual transaction costs amount to approximately **€0.9-€1.9 bn**, considering that not all exporters consult a lawyer.[78] In the absence of action, by the year 2020 they would accumulate to **€9-€19 bn** if the same level of export entry persists. The annual costs would be substantially higher if the ongoing annual compliance costs were indeed significant, as some business representatives pointed out.[79] However, they are not included in this estimate, due to lack of more representative data.

The impact of transaction costs is likely to vary depending on the size of the company and would affect mostly micro and small enterprises. The smaller a company turnover the greater the share of the transaction costs, as shown by Table 2. Notably, the impact on micro-enterprises is disproportionately high: for a micro enterprise exporting to 3 MS the transaction costs could amount to 1/5th of the annual turnover. Moreover, the costs for a micro retailer wishing to export to the whole of the EU, for instance through e-commerce, could exceed its annual turnover. This situation is detrimental to intra-EU trade on the whole, as micro enterprises account for more than 90% of all EU companies.[80]

Indeed, survey data indicates that the overwhelming majority of companies interested, but not involved in cross-border trade are micro enterprises.[81] This could be an indication that the costs may dissuade many micro companies with no cross-border experience from even starting cross-border activities. This situation is contrary to the Europe 2020 objective to achieve an inclusive growth in the internal market, reiterated in the Single Market Act, which highlights the importance of facilitating the development of small and micro enterprises.[82]

Table 2: Transaction costs as a percentage of annual turnover

	Manufacturing						Wholesale and retail trade					
	Average annual turnover per firm[1]	Number of MS entered (with transaction costs per MS = €9 000)					Average annual turnover per firm[1]	Number of MS entered (with transaction costs per MS = €9,000)				
		1 MS	2 MS	3 MS	4 MS	26 (whole EU)		1 MS	2 MS	3 MS	4 MS	26 (whole EU)
Micro	214 791	4.19%	8.38%	12.57%	16.76%	108.94%	138,110	6.52%	13.03%	19.55%	26.07%	169.43%
Small	2 703 212	0.33%	0.67%	1.00%	1.33%	8.66%	3,658,098	0.25%	0.49%	0.74%	0.98%	6.40%
Medium	18 344 866	0.05%	0.10%	0.15%	0.20%	1.28%	10,524,563	0.09%	0.17%	0.26%	0.34%	2.22%
Large	237 342 066	0.00%	0.01%	0.01%	0.02%	0.10%	397,210,535	0.00%	0.00%	0.01%	0.01%	0.06%

1.Source: Eurostat structural business statistics

Example: A small business limits its cross-border trade because of high transaction costs

A British company of 6 people producing designer hats becomes famous after a celebrity wears one of its hats on Ladies' Day at Royal Ascot. Now that its products are popular, the company receives enquiries from all over Europe. It decides to set up an online shop which would be accessible by clients in the whole of the EU. For this purpose, the company contacts a lawyer and a software developer.

76 Eurostat database DS-056329-1: Trade by activity and enterprise size class.

77 The estimate of 14.6% does not reflect that some of the new exporters may have already exported in the past and incurred the transaction costs. However, this is partly balanced, as this estimate does not include companies which already export and want to expand their operations to more EU countries. See Annex III for explanations.

78 Simplified estimate: approximately 6 bn*14.6%= €0.88 bns; 13 bn*14.6%= €1.90 bn. For more precise explanations, see Annex III.

79 Deutscher Industrie-und Handelwkammertag (DIHK), Position Paper on the Feasibility Study carried out by the Expert Group on European contract law, p.2.

80 According to the figures underlying the Small Business Act, micro enterprises account for 91.8% of all EU enterprises.

81 The sample of respondents to the EB 320 and EB 321 show that 86% of the surveyed companies that were interested, but not involved in cross-border trade were micro enterprises.

82 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve levers to boost growth and strengthen confidence, Working together to create new growth, COM(2011) 206 final of 13.4.2011, p.5.

The lawyer advises to hire an expert in contract law from each relevant country as it would be necessary to check the relevant national consumer contract laws and possibly draft an amended set of country specific terms and conditions. This could cost around €8,850 per country (5 days work billed at €295 per hour). The market entry cost for all the other 26 MS would therefore be €230,100. *The software developer* explains that the current website needs to be adapted to reflect the legal requirements for each country they sell to: it needs to determine the consumer's country of residence, locate and retrieve the correct set of pages and display them in a correct language. This adaptation would take between 2-6 weeks at a cost €1,550 per week. Thus, the cost per country would be at least €3,100 and upon entering the other 26 MS this would rise to €80,600.

The transaction costs for offering products in the whole of the EU would be about €310,000. This would be 50% more than the company's complete turnover of the previous year. Upon seeing the amounts, the company decides that the maximum it can afford would be €25,000 - the approximate costs of entering two additional MS. It decides to offer products only in the larger markets of Germany and France instead of selling it to all the other countries.

2.3.3. Driver 2: Perceived increased legal complexity hinders cross-border trade

The perception of legal complexity is an additional factor affecting the decision to start cross-border trade. Out of 11 obstacles to cross-border trade the difficulty in finding out about the foreign contract law affected the highest percentage of export oriented businesses (40% of respondents experienced an impact) for B2C[83] and a slightly lower percentage (35% of respondents) for B2B transactions[84] (see Annex IX). Out of the companies with an interest, but no cross-border experience 44% involved in B2C and 51% in B2B transactions regarded this as a barrier.[85]

In B2B transactions the complexity results from the frequent need to adapt to the national laws of business partners, as is the case for at least 14.6% of companies involved in cross-border trade.[86] In B2C transactions the companies need to be aware of applicable mandatory provisions of the national law of the consumers towards whom they direct their activities. 61% of businesses with no cross-border experience are not at all or not well informed about such provisions.[87] Thus, a legal environment characterised by complexity and high costs for overcoming is likely to dissuade companies from commencing cross-border trade.

2.4. Problem 2: Consumers are hindered from cross-border purchases and miss opportunities

The level of cross-border shopping in the EU remains relatively low with 26% of consumers purchasing from another EU country when they travel[88] and 9% from a distance.[89] Barriers on the supply and demand side appear to hinder its growth. On the supply side, businesses limit their cross-border operations and may refuse sales to consumers in other MS (e.g. because of costs related to the mandatory provisions of the consumer's national law). On the demand side, most consumers are still reluctant to shop cross-border, as the low level of cross-border e-commerce illustrates: while 33% of consumers purchased products online in their own country, only 7% made purchases cross-border.[90] The barriers reinforcing this reluctance are regulatory barriers (mostly related to contract law provisions protecting the consumer e.g. remedies for faulty goods, delivery[91] and availability of redress)[92] and practical barriers (e.g. language, geographical location, access to the internet).

83 EB 321, p. 19.

84 EB 320, p. 15.

85 EB 320, p. 63; EB 321, p. 64.

86 EB 320, p. 57: 14.6% of respondents said they frequently applied the law of their business partner in their cross-border B2B transactions.

87 EB 321, p. 58, on awareness of consumer protection provisions in the contract law of other MS by respondents who are interested, but not yet trading cross-border.

88 EB 299 Cross-border trade and consumer protection, 2010, p. 23.

89 EB 299, p. 23.

90 EB 299, p. 13.

91 Problems of delivery may be of a regulatory (different contractual rights, availability of redress to enforce these rights) or practical (transport and logistics) nature.

92 This report acknowledges the importance of all existing barriers to cross-border shopping.

While the impact of practical barriers is gradually decreasing,[93] the importance of the regulatory ones remains high. They are key factors for consumer confidence in cross-border shopping.[94] The Commission is tackling the regulatory barriers with several initiatives.[95] This IA addresses the contract law related barriers.

2.4.1. Driver: Contract law differences impact negatively upon cross-border shopping

Contract law includes rules protecting consumers entering into economic transactions. The certainty about the content of these rules is a major factor determining consumer confidence in cross-border shopping. Certainty decreases when consumers are confronted with the complexity of different foreign laws and the subsequent uncertainty about their rights in a cross-border context. As a result, many consumers are dissuaded from purchasing cross-border: 44% of European consumers say that uncertainty about their consumer rights in general discouraged them from purchasing from other EU countries.[96] When asked about specific problems, a significant percentage of EU consumers expressed concerns related to rights regulated in contract law in particular. For instance, 57% were dissuaded by the uncertainty about their rights in case of faulty products and 47% in case of non-delivery.[97] For instance, in a study on online shopping 26% out of the participants who had problems in online cross-border shopping said that delivery took too long; 20% were not delivered the product at all and for 18% the delivered product did not match the description on the web-site.[98]

When such problems arise consumers have to rely on their contractual rights. Based on these rights consumers can use remedies for non-performance. However, in a cross-border context they may need to deal with increased legal complexity. Depending on the law which applies to the contract, the level of consumer rights the seller is obliged to respect may differ.

Moreover, the conflict of law rules which determine which law applies in cross-border transactions do not protect the pro-active consumers who shop cross-border. The Rome I Regulation only grants the consumer the protection of the mandatory rules of his own national law in case the trader directs its activities[99] to the MS where the consumer is domiciled. If the trader does not envisage doing business with consumers from another MS, but agrees to contract with them at the consumers' own initiative, the consumers do not benefit from the protection rules of their national law. In the latter situation, consumers who are used to certain rights in their own country may not have the same level of protection if they contract with a foreign trader. For instance, as regards remedies for faulty goods, when consumers shop cross-border, under the laws of some countries they have to notify the trader if the goods they bought are defective. If they do not do this they will lose their rights to a remedy. In other countries this notification duty is not required. This can lead to a situation where the consumer does not notify the business because he does not know about this duty from his own law and therefore inadvertently loses his right to a remedy. Furthermore there may be differences in the way consumers can exercise a given right. For instance, in the case of faulty products, only in a handful of the 27 MS can consumers choose between the remedies of repair, replacement, reduction

93 EB 299, p. 6: A higher number of consumers (39%) are prepared to purchase products using another EU language (compared to 33% in 2006) and fewer consumers (25%) are not interested in cross-border shopping because of lack of internet access (compared to 39% in 2006).

94 EB 299: While 47% - 57% of EU consumers did not shop cross-border due to various regulatory barriers, only 25% did not do it due to lack of internet access.

95 The Commission is also preparing a legislative initiative on ODR aimed at giving consumers the possibility to have easier access to online dispute resolution. If it is necessary to resort to court procedure the EU has adopted the small claims procedure. The Commission will adopt guidelines for the effective application of provisions of the Services Directive to combat the discrimination against recipients of services.

96 EB 299a, p. 5.

97 EB 299, p. 30: Problems of delivery may be of a regulatory (different contractual rights and redress to enforce them) or a practical (transport and logistics) nature.

98 Preliminary data, forthcoming Consumer Market Study on the functioning of the e-commerce in goods, Civic Consulting: 16% out of the respondents who had problems in online cross-border shopping were delivered a damaged product, 13% received the wrong product, 5% could not return a product they did not like and get reimbursed and 4% were refused replacements or repair of a faulty product by the business.

99 This concept has been clarified by the ECJ in the Pammer and Alpenhof Judgments (C-585/08 and C-144/09).

in price or reimbursement. However, in most MS they would initially be entitled only to repair and replacement.

Example: a consumer uncertain about his rights is dissuaded from cross-border shopping Manuel is Portuguese and he lives in Lisbon. His partner Joana is a student, who received an Erasmus scholarship and is spending a semester in Berlin. On her birthday she will have to study in Berlin for an exam. Manuel wants to surprise her with a present. He decides to give Joana a watch and finds a beautiful watch for €150 in a French online shop. Luckily they deliver to Germany. However, Manuel has doubts: What if the watch gets damaged on the way and does not work? Would Joana have the right to return the watch, like they do in Portugal? Would she herself have to pay the additional delivery costs for returning the watch? Or if she really wanted to keep the watch, could she replace it? If so, who would bear the costs for the replacement? With all those questions in mind, Manuel thinks it is better to be safe than sorry. He decides to buy Joana a present in Lisbon and to give it to her in person when they see each other in two months.

Furthermore, at least a third of consumers have wrongful expectations about the applicable law in a cross-border context.[100] While it is usually indicated in the terms of the contract, the majority of consumers do not always check this clause. [101] Moreover, most consumers either do not read the terms and conditions (27%) or do not read them carefully and completely (30%).[102] Thus, the majority of consumers may not be fully aware of their rights.

With a relatively high uncertainty about their rights, most consumers do not feel as confident to shop cross-border, as they do domestically. Almost half of EU consumers (48%) are more confident when ordering products online from traders based in their own country than from those in other parts of the EU.[103] Moreover, a clear majority (56%) of Europeans thought that suppliers from other EU countries are less likely to respect consumer protection laws than those from their home country.[104] Notably, concerns relating to contract law have a greater impact upon consumers with no cross-border shopping experience - currently the majority.[105] These concerns will not entirely be removed even after the adoption of the CRD, which will not regulate some of the key problematic areas, such as remedies for faulty goods. Therefore, pro-active consumers interested in cross-border shopping to a large extent will still have to deal with a highly complex legal environment, which discourages many from taking advantage of the internal market.

2.4.2. Consumers miss out opportunities of the single market

Consumers who are deterred from cross-border shopping may be disadvantaged within their domestic market. Due to substantial differences in price and choice across the EU, the best offers can often be found in another EU country.

- **Higher prices and restricted choice**: The average differences in price for consumer goods across MS, as shown in table 3, amount to approximately 24%.[106] The high price differences in the EU are particularly visible online: A basket of 124 consumer goods could be bought online much cheaper in the UK, followed by Germany and Italy, while Denmark and the Netherlands had the

100 EB 342 Consumer empowerment survey, p. 122-125.

101 Allen and Overy, Online consumer research, 2011: 54% of consumers in the 6 largest EU MS never or only occasionally check which country's laws govern the sellers terms and conditions.

102 EB 342, p. 122-125; Allen and Overy, Online consumer research,2011: 52% of the consumers in the 6 largest EU MS never (5%) or only occasionally (47%) read the terms and conditions when purchasing online.

103 EB 299, p. 25.

104 EB 252, Consumer protection in the internal market, 2006, p. 55.

105 EB 299a, p. 10: uncertainty about their contractual rights which 45% of consumer with no cross-border experience perceived, dissuaded from purchasing cross-border. Out of the consumers who had cross-border shopping experience, 26% were uncertain about their rights.

106 Eurostat, Statistics in focus 50/2009.

highest average prices.[107] Further evidence suggests that consumers in smaller MS, notably Malta, Cyprus, the Czech Republic, Slovakia and Slovenia,[108] are particularly disadvantaged by higher prices.

Table 3: Price differences of consumer goods across the EU

	Clothing (prices vis-a vis EU 27 average= 100)	Footwear (prices vis-a vis EU 27 average = 100)	Consumer electronics (prices vis-a vis EU 27 average= 100)	Household appliances (prices vis-a vis EU 27 average=100)
Most costly country	Finland = 123	Finland=121	Cyprus=120	Malta=141
Cheapest country	UK= 83	Bulgaria=80	UK=86	UK/ Bulgaria=84
Difference in %	48%	51%	39%	68%

Source: Eurostat 2009, Statistics in focus 50/2009

A recent mystery shopper study[109] testing the availability of online offers also demonstrated the price discrepancies across EU countries. In 50% or more of the cases consumers in 13 MS could have bought products at least 10% cheaper abroad than in the domestic market.[110] Likewise, there were discrepancies in choice: in over 50% of the product searches for 100 popular consumer product, products were not available domestically online in 13 MS. Indeed, a better price is the decisive factor for purchasing cross-border for 65% of consumers shopping online, while the unavailability of a product in the consumer's country is decisive for 56%.[111]

Nevertheless, a substantial number of consumers prefer to shop domestically, due to uncertainty about their rights in cross-border shopping. They do not even try to access better offers elsewhere in the EU and are often disadvantaged by the limited choice and higher prices in their domestic markets. If the 44% who are uncertain about their rights in cross-border shopping[112] out of the group of consumers who shop online only domestically would make at least one online cross-border purchase, these consumers could save €380 million.[113]

Example: a consumer who does not shop cross-border faces higher prices at home

Mrs Korhonen lives in Turku, Finland. Her daughter Taru works in Paris. When returning to Finland, Taru is always shocked by the prices she has to pay for the same products in Turku compared to Paris. For example, clothing and footwear are about 30% more expensive in Finland than in France. Taru tries to encourage her mother to start shopping online and buy products like shoes of her favourite brand from France online. She could pay €110 (including the delivery costs) compared to €150 she pays in Turku. Her mother, however, is sceptical and asks "what if the delivered shoes are of a different size than I ordered? Can I send them back? What if the sole wears out only after a week – can I ask for a replacement?" Mrs Korhonen is uncertain whether she would have the same rights she enjoys in Finland and is confident about than, if she shops cross-border, and decides that it is safer to buy the shoes at a much higher price from the high street shop she goes to in Turku.

107 Kelkoo European Online Price Index , conducted among 10 European countries and the USA, March 2011. The study is based on an average price index comparing over a thousand prices for a basket of consumer goods.

108 Eurostat report (Borchert 2009), comparison of price levels of 2,500 consumer goods.

109 YouGov Psychonomics, Mystery Shopping Evaluation of Cross-border E-commerce in the EU, October 2009, p. 38 (YouGov Psychonomics).

110 Portugal (70%), Italy (54%), Slovenia (72%), Spain (52%), Denmark (53%), Romania (54%), Latvia (50%), Greece (63%), Estonia (59%), Finland (55%), Hungary (50%), Cyprus (50%) and Malta (50%).

111 Civic Consulting, Consumer Market Study on the functioning of the e-commerce in goods, expected date of publication: September 2011.

112 EB 299a, p. 5.

113 Currently 33% of consumers above 15 years of age (this age group represents 84% of 500 million of EU citizens) shop online, but only domestically. Assuming that 44% out of this group would make at least one cross-border purchase on average of €52 (i.e. the average amount per credit card transaction, ECB, Value of credit card transactions divided by volume of credit card transactions, http://www.ecb.int/stats/payments/paym/html/index.en.html), and that at least half of these consumers would find the product on average 24% cheaper than in their own country (Eurostat 2009, Statistics in focus 50/2009), these consumers would save around €380 million. Formula: 44%*50%*33%*84%*500 000 000*52*24%= €380 540 160; Data sources: Eurostat Population database, ECB, Value of credit card transactions divided by volume of credit card transactions: http://www.ecb.int/stats/payments/paym/html/index.en.html (last visited: June 2011).

- **Refusal to sell due to contract law related barriers hinders consumers from purchasing cross-border**

Survey data shows that almost a quarter of export-oriented European retailers refused sales due to contract law.[114] Scaling up the data to EU level implies that 9,000 companies refused often or always, while 33,000 did so occasionally.[115] It is difficult to identify though how many consumers were affected by the refused sales due to contract law. One company may refuse orders of multiple consumers and contract law may be only one reason.[116] However, the number of consumers who were affected by the refusal of sales for whatever reason is established. Survey data suggest that at least 3 million consumers[117] said that they experienced the refusal of a sale or delivery from another EU country within one year.[118] This percentage ranged widely between 4% of consumers affected in Belgium to 22% in Ireland and 28% in Malta.[119] A person who engages in multiple transactions may experience the refusal of sale many times. A study where mystery shoppers tried to perform 10,964 cross-border test transactions showed that 61% of the attempts to purchase cross-border products would have failed.[120] In 50% of the cases[121] traders refused to serve the consumer's country. Contract law accounts for a proportion of these cases; however for the reasons mentioned above, the exact proportion is difficult to identify.

The refusal of sales may dissuade proactive consumers from shopping cross-border and may disadvantage them economically. European consumers spend €42.3 bn annually on cross-border purchases. Assuming that within a year the 3 million consumers who experienced a refusal to sell[122] were refused an order of a product of an average value of €52,[123] the value of failed transactions would be €157 million.[124]

Example: a Cypriot consumer is refused a better cross-border offer

Eleni is a 20 year old Cypriot. She loves photography and would love to buy a new camera with an advanced zoom lens to take pictures of butterflies. The price of such a camera in Nicosia is around €1,540. Eleni works the whole summer as a lifeguard at a hotel swimming pool to save this money. There she meets Ben, a young Briton, who is spending his summer holidays in Cyprus. Ben mentions that the average prices for cameras he has seen in the UK were considerably lower. Eleni starts searching online and indeed finds offers for the same camera sold in the UK about €500 cheaper than in Cyprus. She thinks that the delivery costs to Cyprus could not be more than €50. This means that she would need to spend only €1,100 instead of €1,540 to buy the camera of her dreams. She contacts the shop, but they reply that they do not accept international orders. Eleni finds another shop the website of which is available in French and German. There, the camera cost €1,110, a bit more than in the first shop but it is still a good deal. She contacts the shop and gets the similar answer "we deliver only to France, Belgium, Luxembourg and Germany". After a third unsuccessful attempt,

114 EB 321, p.29: 1% of export-oriented retailers said that they always refused sales due to differences in consumer contract laws; 4% did so often and 18% did not very often. The overall number of retailers which refused cross-border orders is likely to be significantly higher, as the survey data does not cover businesses which do not export. This is the overwhelming majority of retailers (4,420,563 out of 4,605,233 according to data from Eurostat's Structural Business Statistics, 2007).

115 EB 321, p. 29: 5% of retailers with experience or an interest in exports refused sales to consumers in other MS often or always and 18% occasionally. Considering that the number of exporting retailers is 184,670 the number of them which refused sales equals 5%*184,670 – always or often and 18%*184,670 – occasionally.

116 Matrix Insight Business practices applying different condition of access based on the nationality or the place of residence of the service recipients, 2009, p. 35: the study found that companies may refuse sales for a range of reasons, including legal and regulatory considerations, as well as supply and demand related drivers.

117 EB 299a, p. 6: 8% of the consumers who had made cross-border distance purchases over the internet, postal service or by phone (9% of consumers above the age of 15 years) were refused cross-border offers. Formula: 8%*9%*84%*500,000,000= 3,024,000.

118 EB 299a, p. 9.

119 EB 299a, p. 9.

120 YouGov Psychonomics, p. 24.

121 YouGov Psychonomics, p. 24.

122 EB 298, p. 16.

123 The average amount per credit card transaction (ECB, Value of credit card transactions divided by volume of credit card transactions, http://www.ecb.int/stats/payments/paym/html/index.en.html).

124 8%*9%*84%*500,000, 000= 3,024, 000 * €52 =157,248,000.

Eleni gives up and buys a camera in a shop in Nicosia paying €1,540. She still cannot understand why the UK shops refused to sell the camera to her. She could have saved €500 and bought with that money an extra zoom lens to take even better pictures of butterflies.

2.5. Need for action at EU level and subsidiarity

- **Right to act**

The Union's right to act in this field is set out in Article 114 TFEU, which provides that the Union shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in MS which have as their object the establishment and functioning of the internal market.[125]

- **Subsidiarity**

This initiative complies with the principle of subsidiarity for a number of reasons. The objectives of facilitating the expansion of cross-border trade for business and purchases by consumers in the internal market cannot be fully achieved as long as businesses and consumers cannot use a uniform set of contract law rules for their cross-border transactions. The current legal framework is not sufficient, as it lacks single set of uniform substantive rules which cover comprehensively the lifecycle of a cross-border contract. Furthermore, as market trends evolve and prompt MS to take action independently (e.g. in regulating digital content products) regulatory divergences grow. They lead to increased transaction costs and legal complexity for business, as well as uncertainty, affecting businesses and consumers involved in cross-border transactions.

A number of stakeholders acknowledge that the existence of differences in contract laws have led to legal fragmentation which can affect the functioning of the internal market; this may entail additional transaction costs and legal uncertainty for business and a lack of consumer confidence.[126] The Union is best placed to address obstacles to the functioning of the internal market as these obstacles have a clear cross-border dimension. More specifically, it is best placed to address contract law related obstacles by developing a single set of uniform substantive contract law rules. It will add value to the existing legal framework by creating such rules for consumers and businesses that engage in cross-border transactions.

3. POLICY OBJECTIVES

The overall objective is to support the economic activity in the internal market by improving the conditions for cross-border trade for the benefit of businesses and consumers. The improvement should be achieved by reducing the barriers caused by differences in contract law between MS.

General objective 1 – Businesses Facilitate the expansion of cross-border trade in the internal market	**General Objective 2 – Consumers** Facilitate cross-border purchases by consumers in the internal market
Specific objectives • Increase number of companies starting cross-border activities • Increase number of companies expanding their activities to more MS	**Specific objectives** • Increase in consumer confidence in shopping cross-border • Decrease number of consumers who experience refusal to sell • Improve access to offers from across

125 Furthermore, according to Article 114(3) TFEU, when submitting proposals, the Commission must take as a base a high level of consumer protection.

126 Response to the Green Paper by Member States, such as the Government of Luxembourg, p.2-3, or the Netherlands, p. 1; business stakeholders, such as BusinessEurope, p.2, British Retail Consortium, p.2, Federation of Small Businesses in the UK, p.3, Association des Banques et Banquiers, Luxembourg, p. 1-2, CEA, Insurers of Europe, p. 1, LVMH, p. 2, or Nokia Corporation, p.2; or others like the Scottish Law Commission, p.4 and the CEP, Centrum für Europäische Politik, p. 3.

	the EU
Operational objectives • Reduce additional transaction costs when trading with more than 1 MS • Reduce legal complexity in cross-border trade	**Operational objectives** • Ensure high level of consumer protection • Reduce uncertainty about consumer rights in cross-border shopping

Compliance with horizontal EU policies

The above objectives are in compliance with the horizontal policies of the EU. The need to tackle barriers posed by differences in contract law is recognised in a number of strategic documents for the EU, such as the Commission's *Europe 2020 Strategy*,[127] the Digital *Agenda for Europe*,[128] the *Review of the Small Business Act*,[129] the *Single Market Act*[130] and the *Action Plan for Implementing the Stockholm Programme*.[131]

Moreover, the objectives of this initiative contribute to the achievement of the strategic objectives for the development of the Single Market, highlighted in the Europe 2020 strategy. Europe 2020 states that often, businesses and citizens still need to deal with 27 different legal systems for the same transaction in the context of the bottlenecks to the Single Market. It is noted that the access for SMEs to the Single Market must be improved and that citizens must be empowered to play a full part in it. This requires strengthening their ability and confidence to buy goods and services cross-border, in particular on-line. Making it easier and less costly for businesses and consumers to conclude contracts with partners in other EU countries is foreseen as one of the actions the Commission will propose in order to tackle the remaining bottlenecks in the Single Market.

4. POLICY OPTIONS

This initiative focuses on the obstacles that differences in contract law pose to cross-border trade in goods as demonstrated in Section 2 on the Problem Definition. The policy options examined focus on the areas of contract law that are most relevant for addressing the problems identified, i.e. sales of goods and digital content.[132] These contract law areas will be referred to as a **Common European Sales Law**. The notion of a Common European Sales Law is introduced for the purpose of accuracy, as the concept of *European contract law* is very broad and it also includes a number of other contract law areas that were not addressed by this initiative.

4.1. Options for type of intervention

- Option 1: Baseline scenario (No policy change)

127 Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, p. 21, 3.3.2010; See also Annual Growth Survey, Annex 1, progress report on Europe 2020 (COM(2011) 11 - A1/2) p. 5.

128 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010) 245 final ,26.8.2010, p. 13 and p. 37.

129 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Review of the "Small Business Act" for Europe, COM(2011) 78 final, 23.2.2011, p. 11 and p. 13.

130 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve levers to boost growth and strengthen confidence, Working together to create new growth, COM(2011) 206 final, 13.4.2011, p. 14 and p. 19.

131 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, p. 5 and p. 24, 20.4.2010.

132 These are discussed in detail in section 4.2.3 on the Substantive Content and illustrated in Table 2 in Annex II.

The current legal framework[133] (including the CRD) could be maintained without further EU action. This option would also take into account the text developed by the EG.[134] Although not politically endorsed, it could be used by European and national legislators as a source of inspiration when drafting legislation. In addition, contractual parties could agree to integrate the rules developed by the EG in their contracts.

- Option 2: A toolbox for the EU legislator

The toolbox could set out definitions, principles and model rules on topics related to contract law that are likely to be subject to EU legislation. Two toolbox forms could be envisaged:
a) Toolbox as a Commission document: The Commission could adopt for instance a communication on a toolbox and commit itself to use the concepts set out in the toolbox when preparing relevant legislative proposals. However the Council and EP would not be bound to do so.

b) Inter-institutional agreement on a toolbox: An inter-institutional agreement between the Commission, EP and Council would bind the three institutions to use the toolbox concepts when drafting and negotiating legislative proposals related, except when overriding sector-specific reasons would lead to another result.

- Option 3: Recommendation on a Common European Sales Law

A Common European Sales Law instrument could be attached to a Recommendation addressed to MS encouraging them to incorporate it into their national laws voluntarily, allowing them discretion on time, method and extent of implementation. Two possibilities can be envisaged for the Recommendation, which could encourage MS to:

a) Replace their respective national contract law rules with a Common European Sales Law instrument. A similar approach has been implemented in USA: the Uniform Commercial Code (UCC) was agreed by experts in commercial law and endorsed by neutral, quasi-public organisations. The UCC has been adopted in the United States, even though with changes in some states.

b) Incorporate a Common European Sales Law instrument as an optional regime, which contractual parties from different MS could choose as an alternative to national law.

- Option 4: Regulation/Directive setting up an optional Common European Sales Law

An optional Common European Sales Law could be set up and used as a 'second regime', co-existing in the national legal regimes with the relevant specific national laws as an alternative particularly suitable for cross-border trade. It would be a comprehensive, self-standing set of contract law rules with a high level of consumer protection, which could be chosen by the parties as the law applicable to their cross-border contracts. This self-standing legal regime would allow businesses to use one set of rules irrespective of where in the EU they wish to sell their products. In B2C transactions, business would have the choice of proposing to apply the optional Common European Sales Law, while the consumer will be free to reject this offer and purchase the product from another provider under its domestic law.

- Option 5: Directive on a mandatory Common European Sales Law

A mandatory Directive on Common European Sales Law could harmonise the national contract laws of the 27 MS. It would complement the consumer *acquis* and would be based on a high level of consumer protection, as required by the Treaty. It could take one of two forms:

133 See section 2.2 and Annex II for further explanations.

134 The publication of the work of the EG was foreseen as option 1 in the Green Paper. As it was published on 3 May 2011 on the website of the Commission, at the time of the submission of this report this option is part of the baseline scenario.

a) Full harmonisation Directive: This would ensure that the same EU contract law concepts apply in all MS and, for B2C contracts, would allow businesses to apply the same consumer contractual rules in all countries towards which they direct their activities.
b) Minimum harmonisation Directive: MS would be able to maintain or introduce more protective rules for B2C contracts, subject to compliance with the Treaty. They would also have the freedom to choose the means necessary to implement the provisions of the Directive. However, businesses would still need to ensure compliance with the different consumer contract law rules where they have gone beyond the Directive in all those countries towards which they direct their activities.

- Option 6: Regulation establishing a mandatory Common European Sales Law

A mandatory Regulation establishing a Common European Sales Law could replace all EU national contract laws with a uniform set of rules. This solution would remove legal differences in contract laws and lead to a uniform application and interpretation of the provisions of the Regulation. As regards the intended result, the outcome of this option is close to a full harmonisation Directive. Thus, the two options will be analysed jointly.

- Option 7: Regulation establishing a European Civil Code

A Regulation establishing a European Civil Code would create a uniform set of European civil law rules which would replace national laws. It would go a step further than the Regulation establishing a Common European Sales Law, as it would regulate additional matters, for example tort law. Due to its broad scope such an instrument would minimise the need to fall back on national provisions in related areas of law.

- Discarded options
  - Option 3a: Recommendation encouraging MS to replace national laws
  - Option 7: Regulation establishing a European Civil Code

Option 3a received hardly any support from the MS who responded to the Green Paper.[135] Thus, it is practically not plausible, since MS would have to implement the recommendation voluntarily. Similarly, the European Civil Code received hardly any support from MS at this stage. Moreover, it would go beyond what is necessary and would be disproportionate. It also raises serious issues of subsidiarity.

4.2. Options for scope and content

4.2.1. Sub-option 1 for scope: B2C / B2B contracts

- **An instrument applicable to B2C contracts:** It would contain provisions typical for consumer contracts, such as mandatory provisions ensuring a high level of consumer protection, but also rules of general contract law which would apply by default.
- **An instrument applicable to B2C and B2B contracts**: In this sub-option, a distinction between provisions specific to consumer and business contracts would be necessary. Contrary to these B2C rules with specific consumer protection contents, almost all B2B rules would be default provisions which apply when parties have not agreed on different terms.

4.2.2. Sub-option 2 for scope: Cross-border / domestic contracts

- **An instrument applicable to cross-border transactions**: The instrument could be chosen only in a contractual relationship between parties across borders. In B2C contracts (in addition to their

135 Only the Czech government said that it could accept option 3a in its response to the Green Paper, due to its voluntary nature. The Finnish, Hungarian and French governments also considered option 3 acceptable, without specifying explicitly a preference for option 3a. However, considering that these governments particularly liked the voluntary nature of this option and rejected the binding options which require replacing their national laws, it would seem unlikely that they would be willing to implement option 3a at this stage.

national law which would apply to domestic transactions with consumers) businesses would be able to sell to 26 other MS on the basis of a single Common European Sales Law.

- **An instrument applicable to cross-border and domestic transactions:** It would further simplify the regulatory environment, as business could operate domestically and in all other EU MS based on the same single Common European Sales Law for both B2B and B2C contracts.

4.2.3. Sub-option 3 for substantive content: areas of law covered

The Green Paper consulted on a narrow and a broad interpretation of the substantive content.

- **A narrow substantive content**: An instrument with a narrow content would be limited to rules on: definition of contract, pre-contractual duties, formation, right of withdrawal, representation, grounds of invalidity, interpretation, contents and effects of contracts, performance, remedies for non-performance, plurality of debtors and creditors, change of parties, set-off and merger, and prescription.

- **A broad substantive content**: An instrument with a broad content would cover all the areas of contract law mentioned above. In addition, it would cover areas, such as restitution, non-contractual liability, acquisition and loss of ownership of goods and proprietary security in movable assets. Moreover, it could contain rules on specific services contracts.

For the purpose of the current IA **a combination of the narrow and broad content possibilities** will be analysed. This combination has been chosen, as it covers the vast majority of usual practical problems within a life cycle of cross-border contractual relationships.

The contract law areas included are those where most problems occur, namely pre-contractual duties, right of withdrawal, performance and non-performance, which are currently largely regulated on a minimum level in the existing acquis. As repeated in many responses to the Green Paper, the instrument should in any case cover mandatory consumer contract law rules, taking the Union acquis as a starting point. However, as these areas are intrinsically linked to several areas considered in the narrow content (i.e. contract formation, grounds of invalidity, interpretation, contents and effects of contracts, and prescription), it is reasonable to include them too. Furthermore, the area of restitution (mentioned in the broad content) should also be included, as it deals with the consequences of withdrawal from, termination or avoidance of the contract.

Including *digital products*[136] is justified to ensure consistency with the CRD which includes rules on digital products in its scope and contains rules on pre-contractual information and right of withdrawal for them. The Common European Sales Law instrument will take over the respective rules from CRD. As the Common European Sales Law instrument would also include the added value of complementing them by uniform rules on remedies, these rules would also (with appropriate adaptations) apply to digital products. A uniform and comprehensive set of contract law rules applicable to digital products would facilitate the cross-border trade in this sector, by reducing transaction costs and increasing legal certainty.

Other contract law areas were excluded. They include representation, plurality of debtors and creditors, change of parties, set-off and merger (under sub-option 3.1). Discussions in the EG and the stakeholders expert group led to the conclusion that they do not generate many problems in cross-border contractual relationships. Furthermore, *services contracts* in general were excluded from the scope for two main reasons: services are very heterogeneous (e.g. they include many different categories like contracts for transport and hairdressers) and therefore are complicated to regulate. Furthermore, there was minimal support for their inclusion by the respondents to the Green Paper. While financial services received some support, it was considered that they are totally unrelated to sales. It is therefore practically impossible to deal with them in the same instrument. On the other hand, specific services contracts (e.g. maintenance and repair) which are directly related to sales,

136 Digital product are currently not regulated under EU law: they are excluded from the scope of the Sale of Consumer Goods Directive. The Directive only applies to tangible goods. They were also not included in the scope of the Proposal on Consumer Rights Directive, but negotiations have changed this.

provided by the seller and concluded at the same time as the sales contract are intrinsically linked to sales contracts. Therefore, they could not be left out.

Other areas of law excluded were non-contractual liability, acquisition and loss of ownership of goods and proprietary security in movable assets. A study conducted during at an earlier stage of the work on European contract law found that no serious problems existed in these areas in a cross-border context.[137] In the field of property law the only problems concerned the issue of retention of title clauses, but this is dealt with to a large extent in the Late Payments Directive. Other areas of property law are not envisaged for regulation at EU level, considering also that Article 345 TFEU states that the EU shall not prejudice the rules in the MS governing the system of property ownership.

This scope has largely been determined based on the advice of the EG and the stakeholders expert group. The feasibility study of the EG reflects this approach and contains a self-standing set of rules, developed within 19 chapters (see Annex on Legal Framework for details). In determining the appropriate substantive content the Commission took into account the stakeholder concerns that the instrument should be user-friendly, practical and that it should have a balanced level of consumer protection.

- **Key substantive provisions (See Annex VIII on Substantive provisions for details)**

The key provisions analysed in detail in Annex VIII would produce significant impacts upon stakeholders. They include consumer protection provisions (e.g. pre-contractual information, remedies for non-performance, burden of proof, damages) and SMEs protection provisions (pre-contractual information, surprise clauses, unfair terms, penalty clauses control). While there may be numerous variants for each individual provision what matters most is that the instrument as a whole strikes a reasonable balance, so that it suits the interests of business and gains the trust of consumers in line with the objectives in section 3. While most of the provisions lead to an increase in the level of protection compared to the existing acquis and the national laws of a representative selection of MS, the analysis found that they strike a reasonable balance.

5. ANALYSIS OF IMPACTS[138]

For further description of the assumptions underlying the analysis, see Annex IV[139] of this IA; for detailed description of the policy options' (POs) impacts, see Annex V.

5.1. MAIN IMPACTS OF POLICY OPTION 1: BASELINE SCENARIO

Economic impacts

Transaction costs: The current legal framework in the EU does not contain a single set of uniform and comprehensive contract law rules which could be used by consumers and businesses in cross-

137 C. von Bar, U. Drobnig, The Interaction of Contract Law and Tort and Property Law in Europe, A Comparative Study, European Law Publishers, May 2004.

138 Unless otherwise stated the analysis in this section applies to both B2B and B2C transactions in a cross border only context. In addition, unless otherwise stated, all data in this section comes from EB 320 and 321. (EB surveys 320 and 321 provide data on the attitudes of export oriented companies, in particular, on their willingness to use the European contract law and the impacts it could have on the level of their cross-border trade. More specifically, the respondents indicated to what extent they would use European contract law if it was made available and whether they would expand their trade to more Member States. The impacts on all considered macro-economic variables are computed based on the companies' expectations for cross-border expansion of their trade if European contract law existed).

139 The economic impacts in this section have been calculated using the Global Trade Analysis Project (GTAP) model. (See www.gtap.agecon,purdue.edu and Hertel et al. (1997), Global trade analysis; Modelling and applications, Cambridge University Press.) GTAP is a static general equilibrium model analysing changes in production, trade and consumption as a consequence of changes in such exogenous variables as costs. The model has an Input-Output structure for all the economies included. Trade is identified at the bilateral level. The model includes all countries in the EU27 and 57 products among which 24 are manufactured goods. GTAP is able to calculate the impact of a new policy on GDP, trade, employment, intra-EU trade, consumer prices, expenditure and consumer welfare.

border trade. The existing patchwork of European and international legislation has led to a limited number of uniform rules only in a few areas of contract law. As a result, substantial differences between MS contract laws remain. The baseline scenario (BS) transaction costs[140] (one off) for trading with one other MS amount to on average: in B2C transactions €9,100 (€8,695- €9,565, plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs) and in B2B transactions €9,800 (€9,000-€10,658).

For a micro trader the cost of trading in one additional MS amounts to 6.5% of its average annual turnover and for trading in the whole of the EU exceeds its average annual turnover by almost twice. For a small enterprise in the same sector the cost of trading in one additional MS would amount to 0.25% of its annual turnover. For trading in the whole of the EU this would be 6.4% of its annual turnover, for a medium enterprise this cost would be 2.22% of its annual turnover for a large enterprise it would cost 0.06% of its annual turnover. There is an annual aggregate transaction cost for the EU economy as new traders enter the market which is approximately €1-2 billion. If these costs continued by the year 2020, exporting firms would face transaction costs of €9-19 billion due to the differences in contract laws.

Administrative costs (included in the overall figure of transaction costs): With no EU action, the average administrative costs[141] per company per MS with which it trades would amount to: in B2C €2,500, in B2B €1,500. These are mostly one-off costs but accumulate as the number of MS a company trades with increases.[142] For example, for trade with 5 MS these figures would be €7,500 for B2B and €12,500 for B2C.

Competition in internal market and impact on consumer prices: With no EU action, competition in the internal market would remain limited. Due to the remaining legal differences and related costs, many businesses would not be encouraged to trade cross-border and therefore create a competitive environment which would drive down prices.[143] Without an increase in competition in the market place, consumers would continue to face a restricted choice of products at a higher price.

Impact on consumer protection: This option includes the adoption of the CRD which, due to its nature as a full harmonisation Directive ensures that within its scope, consumers have the same rights which are harmonised across the EU. Therefore differences between the consumer protection rules of different MS remain. Many Green Paper respondents stated that action should only be taken if a previously adopted instrument has proven to be inefficient.[144] However the text adopted does not harmonise important areas of consumer contract law. For instance, sales remedies and unfair contract terms would remain fragmented across the EU. In addition, the CRD does not cover the full life cycle of a B2C contract or B2B contract.

Impact on SMEs:[145] For those performing B2B contracts, where parties are of a similar size, negotiating the applicable law is a time consuming factor which causes opportunity costs. In the SME Panel Survey, 55% of SMEs responded that the negotiation of applicable law was an important obstacle to cross border trade. [146] In addition, it is normally the stronger (usually larger) party which

140 See problem definition and Annex III.

141 See Annex VII on administrative costs.

142 See Annex VII.

143 Thereby not contributing towards the Commission policy towards increasing competitiveness 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage', COM (2010) 614.

144 E.g. BEUC's response to the Green Paper consultation, p. 4; UEAPME's position on the EC Green Paper, p. 2; EuroCommerce's response to the EC consultation, p.1-2.

145 Both Eurochambres and the European Association of crafts, small and medium-sized enterprises (UEAPME) felt the publication of the Expert group's work would be more beneficial from an academic perspective.

146 According to EB 320, p. 15: respectively 5%, 10% and 15% of the respondents, also representing large companies, considered this was a barrier which impacts their decision to sell cross-border.

imposes their country's law on the smaller party[147] as the law applicable to the contract. The smaller party then has to bear the transaction costs of finding out about the foreign contract law which applies to their contract. If the SMEs concerned in both scenarios are micro or small enterprises, then these costs would weigh, in relative terms, more heavily upon them.

Impact on law firms: No impact.

Public authorities: MS:[148] No impact.

Judiciary: Litigation costs which result from the need for courts to investigate and apply different national laws than their own which are relevant for cross-border contracts would remain. Judges would either need to investigate the foreign applicable law themselves or obtain the necessary knowledge through the advice of legal experts or the evidence submitted by lawyers. In these instances, time of the judges and experts/lawyers would be taken to research the foreign applicable law. The cost of this time and research would be borne by either the courts or parties involved.

Analysis of provisions of instrument:[149] No impact.

Social impacts: No impact.

Environmental impacts: No impact.

Online environment: With no EU action, the trend of domestic sales being far greater than cross border ones would continue.

Overall assessment: This option would not remove the additional transaction costs for cross-border trade identified in the problem definition. The subsequent opportunity costs would continue; the level of legal complexity for businesses wishing to trade cross border would not be reduced. This option would also mean that the complexity consumers experience regarding their rights in a cross-border context would remain and the practice of refusal to sell across border would not decrease.

Even though this option takes account of full harmonisation of some consumer protection rules due to the adoption of the CRD, this harmonisation is restricted to only a few selected areas of consumer contract law. Most aspects of this law such as sales remedies and unfair contract terms would remain fragmented across the EU. This fragmentation would not give consumers the full confidence on all their consumer rights for when they purchase across border.

5.2. MAIN IMPACTS OF POLICY OPTION 2

5.2.1. 2a: Toolbox as a Commission Document

The toolbox itself would only have an indirect impact upon businesses and consumers because concepts from the toolbox would be used for the development of future contract law legislation or the revision of existing EU legislation. The legislation itself would have the direct impact. As such a Commission instrument would not be agreed by the Council and EP, the EU legislator could always deviate from the parts on Commission proposals implementing the toolbox. Because of the uncertainty of its implementation, the impact of this option would not only be indirect but also very

147 It is recognised that SMEs are not always in a weaker bargaining position; this example only applies to those who are.

148 In their Green Paper responses, most Member States endorsed the publication of the work of the Expert Group.

149 This analysis is only applicable to those options which describe the impacts of a legal instrument.

limited.[150] For this reason it is difficult to quantify what this impact would be. In addition, there would not be any immediate impact of this option upon businesses as negotiations for new legislation or an amendment to existing legislation would take time to achieve.

Economic impacts

Transaction costs: In the longer term this option could lead to a small reduction in the transaction costs, but the extent of this is unknown as one cannot predict when and how the toolbox concepts would be used.

Administrative costs (included in the overall figure of transaction costs): This option could create indirect administrative costs associated with future contract law requirements. For example if a future law based upon the toolbox obliged a trader to provide information not previously required, it could mean that the trader would have to bear the associated administrative costs.

Competition in internal market and impact on consumer prices: There would be little changed from the BS.

Impact on consumer protection: Where rules from the toolbox (which are not in the current acquis or domestic legislation) are adopted in EU legislation, they could raise the level of consumer protection in the laws of some MS.

Impact on SMEs: Very little change compared to the BS.

Impact on law firms: No change from the BS.

Public authorities: MS: Very little change compared to the BS.

Judiciary: Very little change compared to the BS. A limited indirect impact could be felt by the judiciary who, depending on the extent of the change would need to train for new concepts in future legislation.

Analysis of provisions of instrument:[151] No impact.

Social impacts: No change from the BS.

Environmental impacts: No change from the BS.

Simplification potential: This option could create some convergence of the relevant contract law legislation and result in a small level of simplification as national laws would in time begin to develop similarities to each other.

Online environment: No change from the BS.

Overall assessment: Compared to the BS this option may to a very small extent help to facilitate the expansion of cross-border trade in the internal market. It may also to a small extent indirectly lead to an increased level of consumer protection in national contract laws.

150 European Small Business Alliance response to the Green Paper, p2 also supports that the Toolbox does not have the substance 'to deliver real benefits to businesses engaged in transactions across the wider European market.'

151 This analysis is only applicable to those options which describe the impacts of a legal instrument.

However, since the contract law related transaction costs would largely remain unchanged, the positive impacts of this option on businesses and consumers would be minimal and in turn so would any subsequent impacts upon trade, competition and the internal market. Moreover, any impacts of this option would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time to achieve. Overall, as there is no way of knowing whether and how widely this option would be used and accepted by the Council and EP, the impacts of this option would not differ greatly compared to the BS and any impacts felt would be very small and would take place in the longer term.

5.2.2. Main Impacts of Policy Option 2b: Toolbox as an Inter-Institutional Agreement

As per policy option (PO) 2a, the toolbox itself would not have a direct impact upon businesses and consumers. As an inter-institutional agreement would bind the three EU institutions to make use of the toolbox concepts when drafting and negotiating legislative proposals related to contract law (except when overriding sector-specific reasons would lead to another result) there would be less deviation from the use of the toolbox concepts compared to PO2a and more certainty in its implementation.

However, despite this increased certainty, the impacts of this option would remain indirect. For this reason it is difficult to quantify what these impacts would be. In addition, there would not be any immediate impacts of this option upon businesses as negotiations for agreeing new legislation or an amendment to existing legislation would take time to achieve.

Economic impacts

Transaction costs: In the longer term this option could lead to a limited reduction in transaction costs due to the convergence of certain contract law concepts. There is a greater likelihood of this taking place as all three EU Institutions would agree on application of the toolbox concepts rather than just the Commission as would be the case in PO2a.

Administrative costs (included in the overall figure of transaction costs): This option could create indirect administrative costs associated with future contract law requirements as set out under PO2a.

Competition in internal market and impact on consumer prices: There would be little changed from the BS.

Impact on consumer protection: Where rules from the toolbox are adopted in EU legislation, they could raise the level of consumer protection in the laws of some MS. The impact would be the same as set out under PO2a with one difference. As under this option there the toolbox concepts would be accepted by the Council and EP, the impacts would be felt to a greater extent than those felt under PO2a.

Impact on SMEs: Very little change compared to the BS.

Impact on law firms: No change from the BS.

Public authorities: MS: Very little change compared to the BS.

Judiciary: Very little change compared to the BS. A limited indirect impact could be felt by the judiciary who, depending on the extent of the change would need to train for new concepts in future legislation.

Analysis of provisions:[152] No impact.

Social impacts: No change from the BS.

Environmental impacts: No change from the BS.

Simplification potential: This policy option could create a greater convergence of the relevant contract law legislation than PO2a and result in a small level of simplification as national laws would in time begin to develop similarities to each other.

Online environment: No change from the BS.

Overall assessment: As this option involves all three Institutions agreeing to make use of the toolbox, this option would, to a somewhat greater extent compared to PO2a, reduce the differences between national contract laws which would help to facilitate the expansion of cross-border trade in the internal market. This option could to a limited, but greater extent than PO2a indirectly lead to a higher level of consumer protection and legal certainty about consumer rights.

However, since the toolbox would only be used for the amendment of existing or preparation of future sectoral legislation, contract law related costs stemming from differences of national contract laws would largely remain and in turn so would any subsequent impacts upon trade, competition and the internal market. Moreover, there would not be any immediate impacts of this option upon businesses and consumers as negotiations for new legislation or an amendment to existing legislation would take considerable time to achieve. As this option would only concern national contract law rules which are modified following revised or new EU legislation and would only have an impact at the earliest at a medium term, the overall positive impacts of this option would be, albeit greater than PO2a, still rather limited.

5.3. MAIN IMPACTS OF POLICY OPTION 3: RECOMMENDATION OF A COMMON EUROPEAN SALES LAW[153]

This option would encourage MS to incorporate voluntarily into their domestic law a Common European Sales Law instrument as a 'second regime'. This second regime would not replace existing legal traditions, but sit alongside a relevant specific national regime. The rules of the Common European Sales Law could be voluntarily chosen by the parties as the law applicable to their cross-border contracts. Therefore businesses would have the choice to continue to use their national law in their cross border transactions or to use the Common European Sales Law.

This option would only be effective if the Common European Sales Law was incorporated by a number of MS entirely and without amendment to the original version attached to the Recommendation. If this occurred,[154] the transaction costs for cross border trade would be reduced, there would be more trade and competitiveness in the internal market and consumers would benefit by having an increase in choice of products at a lower price as well as an increased level of consumer protection when they buy abroad using the Common European Sales Law.

152 This analysis is only applicable to those options which describe the impacts of a legal instrument.

153 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

154 In order to estimate the impacts of PO3 assumptions on the number of exporting companies taking up the optional Common European Sales Law have been made. EB 320 and 321 show that 70% of businesses would be likely to use a new European contract law instrument. Businesses would however need to agree this choice with their business partners. Therefore the more conservative assumptions i.e. 25% and 50% of companies using the European contract law are applied throughout in the report. This allows demonstrating a range of possible economic impacts.

However, it is highly unlikely that this option would be incorporated entirely or without amendment. This would not greatly affect traders performing a B2B contract (as they would have the freedom to decide on the law applicable to their contract) and therefore, these traders would have the opportunity to reduce their transaction costs by using the Common European Sales Law of one MS which has best implemented it. The same would not be the case for traders performing B2C contracts, as they would have to research whether and where MS have changed the drafting of the Common European Sales Law with regards to mandatory consumer protection rules.

This means that businesses would not be able to sell across borders to consumers on the basis of one single law and would therefore incur transaction costs of the type indicated in the BS. Consequently this option would only to a limited extent remove the hindrances to cross-border trade identified in the problem definition. The voluntary nature of the incorporation would mean that the instrument would not be legally binding and there would be no jurisprudence mechanism to ensure its coherence.

Overall, because of the piecemeal way in which the Common European Sales Law could be incorporated, if at all, this option would further complicate the regulatory environment for both consumers and businesses as both parties in B2C contracts would be subject to differing degrees of the Common European Sales Law in different MS and the divergences in national contract laws would remain. Many respondents to the Green Paper consultation (business groups, consumer organisations and legal practitioners rejected this option). Because this option would add to the issues set out in the problem definition it is highly unlikely to be suitable as a solution, and therefore is only summarised here. The full text of the analysis of this option can be found in Annex V.

5.4. MAIN IMPACTS OF POLICY OPTION 4: REGULATION/DIRECTIVE SETTING UP AN OPTIONAL COMMON EUROPEAN SALES LAW[155]

An optional Common European Sales Law would insert a set of clear and practical rules into each of the different national laws of a MS as a 'second regime'. This second regime would not replace existing legal traditions, but sit alongside a relevant specific national regime. These rules could be voluntarily chosen by the parties as the law applicable to their cross-border contracts. Therefore businesses would have the choice to continue to use their national law in their cross-border transactions or to use the optional Common European Sales Law.

Economic impacts

<u>Transaction costs:</u> This option would greatly reduce transaction costs because it would allow businesses to use one set of rules for cross border trade irrespective of the number of countries they trade with. In practice, this means that businesses using the optional Common European Sales Law may only have to pay one transaction cost for trade with multiple MS. For example, a business exporting to between 1 and 26 MS may only have to pay on average €9,800 for B2B and €9,100 for B2C (plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs) (see BS).

For businesses that already export and decide to expand their sales but decide not to use the optional Common European Sales Law, the transaction costs for exporting to 5 MS could amount to €49,100 for B2B and €45,600 for B2C if the business applied the law of the country traded to in each case. A company applying the optional Common European Sales Law to the same contracts with all 5 MS would save €39,300 and €36,500 respectively. Transaction costs for exports to 10 MS using the law of the country traded to could amount to €98,300 for B2B and €91,100 for B2C. If the trader used

155 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

the optional Common European Sales Law the costs saved would be €88,500 and €82,000 respectively.

Assuming that initially only 25%[156] of current exporters decide to use the optional Common European Sales Law, the instant one-off implementation costs would amount to €1.89 billion.[157] However a business stakeholder noted, the initial cost of the optional Common European Sales Law would be acceptable when compared to continuing potentially high transaction costs.[158] The estimate of transaction costs does not include the potential higher compliance costs for companies in some Member States where the level of consumer protection would increase (see section on analysis of provisions of instrument).

These costs would however be outweighed on the one hand by costs savings for new exporters and on the other by potential savings for current exporters who would expand their cross-border sales to new countries. Using an assumption of 25% of new exporters using the optional Common European Sales Law and the current average level of exports, the annual savings[159] for new exporters would be €150-400 million.[160] In addition, for the current exporters which declared an interest in expanding their activity cross-border and deciding to use the optional Common European Sales Law to start trading with additional EU countries, the potential saving would be between €3.7bn and €4.3 bn.[161]

These cost savings would have the biggest impact upon SMEs (in particular on micro and small companies) and this is where the optional Common European Sales Law would add the most value for such traders. However the optional Common European Sales Law would also save costs (albeit on a relatively lesser scale)[162] for big businesses who want to use the optional Common European Sales Law to trade with other big businesses.

The reduction in transaction costs would also facilitate intra EU trade by removing obstacles for those companies which currently experience difficulties in either conducting cross-border trade or transferring, for example, property by way of cross border sales and would therefore facilitate the exercise of these rights in line with Articles 16 (Freedom to conduct a business) and 17 (Right to property) of the Charter on Fundamental Rights of the EU, respectively.[163]

Administrative costs (included in the transaction costs): This option would require traders to provide consumers with information about the choice of using the optional Common European Sales Law. This would cost a business approximately €500.[164] The application of the optional Common European Sales Law would be voluntary and need only be used by contractual parties if it offered them a commercial advantage compared to the BS. This is one of the instances where the optional

156 EB 320 and 321 show that 70% of businesses would be likely to use a European contract law for cross border sales. 38% of all the companies surveyed would prefer to use a single European contract law as an alternative to their national law. To use the European contract law, businesses would need to agree its choice as the applicable law with their business partners. Assuming that some business partners would not wish to use the European contract law, a more conservative assumption i.e. 25% of companies using the European contract law is applied throughout the report.

157 25% of current exporters in B2B and B2C multiplied by the respective costs-see Annex III.

158 ESBA response to the Green Paper consultation, p. 2.

159 Number of new exporters annually multiplied by the average saving – see Annex III.

160 In a longer term, these annual savings could be discounted to €3.9-€10 bn and the net benefit for the EU economy would be €2-€8.11bn (€3.9-€10 bn minus €1.89bn), See Annex III.

161 Number of current exporters that decide to use the optional Common European Sales Law (25%) multiplied by the saving depending on the number of additional countries they would make cross-border sales to i.e. costs if they were to expand their sales to new countries under the BS €5.6- €6.2 minus the one-off cost of €1.89 bn. See Annex III.

162 The amount a big business spends to trade to the whole of the EU is 0.06% of their average annual turnover (see problem definition).

163 See Annex VI.

164 Explained further in Annex VII.

Common European Sales Law safeguards the principle of 'freedom of contract', which was a concern raised by business representatives in response to the Green Paper.

Exporters could achieve cost savings if trading with more than 1 MS as they would be able to use one set of information, available in all EU languages, If a business used the optional Common European Sales Law the administrative costs would amount to (on average) for B2C contracts €3,000 and for B2B contracts €1,500. Compared to the BS, if a company traded with 2 MS the cost saving per company would amount to €1,500 in B2B and €2,000 in B2C transactions. [165]

Competition in internal market and impact on consumer prices: This option would increase competition in the internal market and lead to a decrease in prices. For competition to increase businesses would need to trade more (both export and import). For B2C contracts 40%[166] of the businesses surveyed said that if they were able to choose a single European contract law they would increase their cross border trade in the internal market. For those performing B2B contracts, this figure was 34%.[167] These surveys have also indicated that 14% of those performing B2B contracts would trade with 6 or more additional countries if they were able to choose a single European contract law, 34% said they would trade with 3-5 new countries and 35% said they would trade with 1– 2 new countries. For those performing B2C contracts these figures were: 18%, 32% and 32% respectively.

An increase in cross border trade would therefore lead to a rise in imports, which would be likely to increase the competition in the importing MS. To be able to compete in the market, businesses would be encouraged to either by improve the quality of their products or reduce prices. This would contribute towards the Commission policy on increasing competitiveness[168] and would be of particular relevance in B2B transactions which include the manufacturing industry. Consumers would benefit from an increased choice of product at a lower price. Prices are expected to decrease around 0.04-0.07% if 25% of EU companies used the optional Common European Sales Law.[169]

If non EU businesses could choose to use the optional Common European Sales Law, they would have easier access to the internal market. Consumers would again benefit from an increased choice of product at a lower price and competition for businesses would be stronger as they would be competing against non EU businesses as well as those in the internal market.

Impact on GDP: Overall EU GDP is expected to increase by €5- €10 billion (0.04-0.08%) (see Annex IV).

Impact on third countries: if third countries could choose the optional Common European Sales Law, they would benefit from an easier access at lower transaction costs to the whole EU market and may be able to expand exports to more EU countries. If they could not use the optional Common European Sales Law, some negative impact could be felt as trade would grow more between EU countries at the expense of potential partners from third countries.

Impact on consumer protection: This option would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[170] by increasing consumer protection in certain areas which are currently harmonised at minimum level, by creating a high level of consumer protection in areas in which the Union has not previously acted by integrating the fully

165 See Annex VII for more details on how these costs are calculated.

166 EB 321, p. 36.

167 EB 320, p. 33.

168 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage,' COM (2010) 614.

169 See Annex IV.

170 See Annex VI.

harmonised provisions of the CRD and by taking the other minimum harmonisation provisions of the acquis as a benchmark.

The optional Common European Sales Law would strengthen rights on some points of particular concern to consumers compared to the existing or to be transposed acquis. For instance, the consumer could choose the type of remedy if the goods did not conform to the contract; these remedies would also be available to consumers who bought digital content products which also did not conform to the contract. These and other consumer protection provisions would give consumers confidence that they would have a very high level of consumer protection whenever they used the optional Common European Sales Law.

To strengthen certainty about their rights and thereby consumer confidence, businesses would provide consumers with a standardised information notice whenever the optional Common European Sales Law was chosen for use. This information notice would explain that a Common European Sales Law applied and would set out information about the key rights consumers would enjoy under the optional Common European Sales Law. The provision of this information responds to some concerns (i.e. increase of the legal complexity, inability for the consumer to make an informed choice for the application of the optional Common European Sales Law) raised by consumer and legal practitioner representatives in their responses to the Green Paper. Within this setting the optional Common European Sales Law could encourage more consumers to shop across-border, as they would have the same rights at a high level of protection everywhere in the EU, whenever the optional Common European Sales Law would apply. Moreover, the information notice would be beneficial for the large percentage of consumers who do not always read terms and conditions, as it would present their key rights in a concise and prominent way before they agree to the contract.[171] If this information is not provided to the consumer, then the consumer would have the right to terminate the contract without bearing any costs. In addition, the agreement would only be valid if the consumer consented - in a separate statement - to using the optional Common European Sales Law. A business would therefore not be allowed to include the choice of the optional Common European Sales Law as only a term in its standard terms and conditions.

The optional Common European Sales Law could become a 'trust mark' for consumers: once they have become familiar with their rights under the optional Common European Sales Law, they would become more certain and therefore confident in purchasing products across the EU under the optional Common European Sales Law's uniform rules. Additionally, the optional Common European Sales Law could be of an advantage to the economic interests of consumers, as they could gain access to more and better offers at a cheaper price, which would not have been made available by foreign businesses if the optional Common European Sales Law had not existed.

Thus, the information notice and the explicit separate statement of consent the consumer will have to provide would also eliminate the fears of several MS and consumer associations who have some concerns about the optional Common European Sales Law, as they think businesses could take advantage of the weaker position of the consumers, as the latter would not be fully able to understand the consequences of choosing an optional Common European Sales Law.

Impact on SMEs: There would be a positive impact upon SMEs trading with more than 1 MS. Micro and small companies would benefit in particular as the cost savings of using the optional Common European Sales Law would be disproportionately high compared to the BS.

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171 According to data from EB 342, p. 122-125, most consumers either do not read the terms and conditions (27%) or do not read them carefully and completely (30%). According to Allen and Overy, Online consumer research, 2011: 52% of the consumers in the 6 largest EU MS never (5%) or only occasionally (47%) read the terms and conditions when purchasing online.

For B2C contracts, if the optional Common European Sales Law were chosen, it would be the only applicable law in the area covered by its scope. Therefore, the trader would have to consider only one set of rules – those of the optional Common European Sales Law. It would no longer be necessary to consider other national mandatory provisions as they would normally have to when concluding a contract with a consumer from another MS. Businesses would also not be required to provide individual explanations of the consequences of the use of the optional Common European Sales Law to the consumer, as the information notice would fulfil this purpose. Businesses could also use optional Common European Sales Law as a mark of quality, ensuring the high level of protection consumers would enjoy under its rules. As consumers increasingly use the optional Common European Sales Law and become more certain about their rights and more confident in cross border purchases, they could seek to contract with it more and more, thereby increasing a businesses customer base.

There would be some administrative costs where provision of information would be required.[172] However these costs would be unlikely to outweigh the cost savings, especially for those companies trading in multiple MS. For SMEs performing B2B contracts, the negotiation of an applicable law between similar sized companies are likely to become easier.[173]

Impact on law firms: There would be a new demand for legal advice from new exporters, as well as from existing exporters who would need to become familiar with the optional Common European Sales Law. This would create an opportunity for law firms to tap into the new market and expand their business on giving advice on contract law.

In their responses to the Green Paper several practitioner representatives mentioned that there would be a cost for law firms to train and familiarise themselves with the optional Common European Sales Law, as with all new legislation. However unlike the BS, some of these costs would be relieved given that the optional Common European Sales Law would be user-friendly, clear and available in all official languages in the EU, and would therefore be more accessible. Moreover there would be public funding available for training on new EU legislation.[174]

In time, there could be a chance that law firms could advise less, which would mean less billable hours for them. However this would be mitigated by the increased flow of new businesses entering the 'cross-border-trade' market and the expansion of existing client advice to a wider range of cross-border transactions covering all MS.

The simultaneous application of the optional Common European Sales Law by national courts would allow case law to build up quickly. The uniform application would be ensured firstly by the ultimate interpretation of the optional Common European Sales Law through the ECJ. A database, accessible to judges and legal practitioners and containing translated summaries of national rulings applying optional Common European Sales Law provisions would ensure transparency and de-facto convergence of relevant case-law. This would alleviate concerns related to legal certainty raised by some Green Paper respondents.

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172 See Annex VIII.

173 In the SME Panel Survey, 55% of SMEs responded that the negotiation of applicable law was an important obstacle to cross border trade. In response to a similar question in the EB 320 (p.16) 25% of respondents said that difficulties on agreeing on the foreign applicable contract law had an impact on their decision to trade cross-border. However, as the sample in the EB also included large companies, the results of the SME Panel survey are more relevant for the SME test.

174 In 2010 the European Commission made available €12 million of funding for judges and prosecutors (and lawyers to a lesser extent) to train on EU new legislation. The cost per trainee was about €1,400. The Commission will continue to finance training and will publish a Communication on this topic by the end of 2011 in which the training on a Common European Sales Law instrument will be mentioned as a priority.

Legal stakeholders were mostly positive towards this option. Some stakeholders from the UK expressed views[175] that this option would make the UK, and in particular London, a less attractive place for, in particular, large companies (who are advised to use common law as their preferred choice of law for international transactions) to obtain legal advice from English law firms. These stakeholders maintain that as a result, the expenses for legal advice[176] made by these businesses would be lost to the UK as companies would obtain legal advice in the US. While these submissions are relevant for PO5/6, they do not really apply to PO4.

An optional Common European Sales Law would not replace national laws. It would become a second regime existing alongside domestic legislation, which could be chosen as an alternative to the national law, only when businesses see fit. Since English law is chosen by companies because of its specificities, compared to other legal systems it is unlikely that companies which already choose it for these reasons would cease to do so.

Thus companies could continue to use common law and the services of English law firms if they choose to do so. In this context it is important to note that the number of EU exporting companies using the law of a 3rd country (for instance English law or Swiss law) is at any rate only 0.6% of EU exporters.[177] SME from non Common law practising countries would not be likely to apply Common law to their contracts (e.g. a Swedish SME trading with an Italian SME would be more likely to use Swedish or Italian law). However a UK based SME trading with a non-Common law country would still have the choice to use common law.

Public authorities: There would be a cost concerning a data-base which would be created and maintained by the Commission. This database would contain summaries of rulings of the application of the optional Common European Sales Law provisions (as submitted by national courts). This cost would fall upon the Commission and would be broken down as follows:

- one-off approximately €100,000[178] for creating the website and database;
- annually approximately €100,000[179] for maintaining the website and database;
- €160.56 for summarising a ruling submitted by a MS' court (assuming that it will take 4 hours to read and summarise one ruling and a documentalist is paid €321.12[180] a day), and
- €117 for the translation of a summary into English, French and German (assuming that each summary will be one page and the translation cost will be €39[181] per page).

MS: The national laws of MS would not be affected. However, MS would bear the costs which would accompany the implementation of EU legislation (such as consultation of stakeholders,

175 Law Society of England and Wales Response to the Green Paper, p.17 – 20; Bar Council of England and Wales response to the Green Paper p.20 and p.21; COMBAR response to the Green Paper p.3; City of London Law Society response to the Green Paper on contract law p. 2.

176 According to the Bar Council of England and Wales Response to Green Paper p.20 and p.21 "Currently the annual fee income of the 100 largest law firms is approaching £15bn, with over half of that revenue being generated by London – based law firms." According to the Law Society of England and Wales Response to the Green Paper p.18. "The City Business series Report on Legal Services in 2007 valued the contribution of legal services to the UK economy at £14.9bn in 2004". However it would need to be noted that the income mentioned above seems to refer to the contributions of all legal services, not just on contract law. Therefore income solely due to the areas of contract law as defined under section 4.2.3. of the IA report in a cross border scenario would be a relatively small percentage of this overall income.

177 EB 320, p. 57.

178 In 2002 a database (JURE data-base) was created for summaries of judgements concerning the Brussels I Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, the Brussels II Regulation no 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, the new Brussels II Regulation no 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, repealing Regulation no 1347/2000 and the Convention of 16 September 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters (Lugano Convention). The creation of this database cost at that time less than €80,000.

179 In the past four years the maintenance of the JURE data-base has cost on average €117,500. As the new data-base will likely be linked with the system of an existing data-base – e.g. the data-bases on the e-justice portal – the cost will assumable be lower.

180 Annex 1 of amendment №4 to Framework contract no JLS/2008/A5/01/lot 21 "Websites, web content management systems and other computer services".

181 Price list in the Framework contract no JLS/2008/A5/01/lot 21 "Websites, web content management systems and other computer services".

printing of new legislation, educating the public about the new law, time and cost of legislative process, etc.)

Judiciary: As raised in the Green Paper consultation, there would be a need for some initial training for judiciaries to familiarise themselves with a new system. However this cost would be mitigated by public funding available for training on the new EU legislation.[182] All legal practitioners across the EU would have access to a database containing summaries of rulings on the application of the optional Common European Sales Law. This would allow them to view the application of the optional Common European Sales Law and ensure the consistency of its application. The use of this option, i.e. a single body of rules, would remove the necessity for judges to investigate foreign law and compare several laws decreasing litigation costs compared to the BS. In the longer term, this would alleviate the administrative load on a MS judicial system. Moreover, the database would also reduce the risk of a different application and interpretation of the optional Common European Sales Law mentioned by several respondents to the Green Paper.

European Court of Justice (ECJ): In the first instance national courts would rule upon cases and submit summaries which would be entered into the Commission created database. These summaries are likely to lead to a *de facto* convergence of rulings by national courts which national judges would be able to access when needing to refer to how provisions of the optional Common European Sales Law have been ruled upon. There may be a limited number of cases which may need to be referred to the ECJ,[183] which would increase the caseload. There would be a financial cost of referral of a case which would need to be borne by the parties to the trial.

Analysis of provisions of instrument:
The tables below present some key proposed consumer and SME protection provisions[184]. They analyse their impact on the level of protection in a representative sample of MS. They also reflect the related potential additional compliance costs for businesses as well as their likely impact on the take-up of the optional Common European Sales Law.

CONSUMER PROTECTION PROVISIONS			
Provision	**Impact on consumer protection**	**Compliance costs for businesses**	**Impact on take-up of optional Common European Sales Law**
Remedies for breach of information duty in doorstep/off-premises and distance contracts	+ BE,NL,LU, HU, UK = DE, EE, FI, ES, FR, IT, PL, PT, RO	No direct compliance costs. Any additional costs would relate to any potential claims for damages for traders who do not fulfil their obligations in NL, BE, HU, LU, UK	= In most MS, the general provisions regarding the rights to damages currently already apply. The Common European Sales Law would confirm or further clarify these obligations but not create any additional obligations that could impact on the take-up of the optional Common European Sales Law.
Duty to ensure information supplied is correct	++ PL, FI + BE,ES, IT, LU, PT, UK (mostly for remedies) = EE	Businesses might face some additional costs to ensure that the information supplied is correct and not misleading; these costs are considered as minor as the required standard would correspond to normal business practices.	= Ensuring that the information supplied is correct is normal business practice and does therefore not create any burden that could impact on the take-up of the optional Common European Sales Law.
Mistake	++ FI, IT, RO, UK +	Some businesses might face a minor increase of costs as the result of strengthened rules concerning the	= Any potential costs would impact on the small number of traders who act in

182 In 2010 the European Commission made available €12 million of funding for judges and prosecutors (and lawyers to a lesser extent) to train on EU new legislation. The cost per trainee was about €1,400. The Commission will continue to finance training and will publish a Communication on this topic by the end of 2011 in which the training on an European contract law instrument will be mentioned as a priority.

183 This increase of caseload would form a minor part of the ongoing overall institutional and budgetary discussion of the of the resources and responsibilities of the ECJ.

184 See more detailed analysis in Annex VIII.

	FR, PL, PT = AT, EE, ES, HU, LU, NL - DE	situations in which a contract might be avoided in UK, PT, IT, PL, FR, FI, RO. These costs are considered as minor as pointing out a mistake is fair business practice.	contrary to fair trading principles and conclude a contract not pointing out a mistake.
Fraud	+ NL, PL, UK = AT, BE, EE, ES, FR, HU, IT, LU, PT, RO - DE	No additional costs for businesses as in most MS the current rules provide for avoidance of a contract for fraud. Any potential costs would only arise for rogue businesses which use fraudulent practises possibly in countries where the present rules are not so clear (e.g. UK, NL, PL).	= The provision does not introduce any new obligations but rather clarifies the existing law.
Unfair exploitation	+ BE, ES, UK = AT, DE, EE, FI, FR, HU, IT, LU, NL, PL, PT, RO	No additional costs for businesses as in most MS the current rules provide for the same level of consumer protection. Any increase of costs would affect only rogue traders.	= The provision does not introduce any new obligations. Any costs would affect only rogue traders.
Interpretation in favour of consumers	++ DE, EE, ES, FI, NL, PL, PT, RO, UK + AT = FR, HU, IT, LU, MT	Some additional costs for companies in case of doubts about the meaning of a contractual term which has not been individually negotiated.	- The interpretation most favourable to the consumer is likely to be more costly for businesses. Businesses would however be able to avoid potential costs by making sure that the contractual terms do not raise any doubts.
Terms unfair as not sufficiently drawn to the consumer's attention	+ ES, IT, HU, PL, UK = BE,EE, LU, PT	Some additional costs for traders as when supplying the terms to a contract they would be obliged to take reasonable steps to draw consumers' attention to them, before or when the contract was concluded in ES, IT, HU, PL, UK.	- The additional costs are considered as minor as the reasonable steps to inform the other party about inserted terms would in practice be relatively easy to implement.
Merger clauses	+ BE, DE, ES, FI, FR, HU, NL, PL, PT, RO, UK = AT, IT, LU	Some additional costs for businesses to adjust their contracts in order to eliminate merger clauses in BE, DE, ES, FI, FR, HU,NL, PL, PT, RO, UK	- Any potential costs are likely to be one-off and only affect companies which use merger clauses in their contracts.
Method of payment	++ DE, ES, FI, FR, HU, IT, NL, PL, PT + UK = EE	Any potential additional compliance costs would only affect traders which do not provide information on the accepted method of payments to consumers. In this case, they would be obliged to accept the usual and appropriate payment methods.	= Businesses would be able to avoid any additional compliance costs as they would have the possibility to indicate the accepted method payments to consumers.
Place of delivery	+ BE, EE, ES, HU, IT, LU, PL, PT, UK	Additional costs for distance and off-premises traders to deliver the goods to consumers' place of residence in most MS.	= These additional costs would depend on the delivery distance and would occur only where the place of delivery was not agreed between the parties.
Right to damages for non-performance	= BE, DE, EE, ES, FR, HU, IT, MT, NL, PL. RO, UK	No additional compliance costs for businesses.	= No additional costs as in most MS the current rules provide for the same level of consumer protection.
Length of prescription period	= BE, DE, EE, ES, HU, NL LU, IT, PL, RO - FR, UK	No additional costs for businesses as in practice the current 2-years substantive period which applies in most MS at present and the proposed 2-year prescription period provide for a similar level of consumer protection.	= No additional compliance costs for companies as in most MS the current rules provide for the same or even higher level of consumer protection.
Period for notifying the seller of non-conformity	++ EE, FI, HU, IT, MT,NL,PL,PT +	The compliance costs for businesses could increase as the number of consumers now legitimately relying on the lack of conformity claims for	- The compliance costs in those MS where a 2 month deadline for notification exists are likely to increase only marginally as the

	ES = FR, LU, RO, UK	remedies made later than 2 months after the consumers discovered the lack of conformity could slightly increase.	risk of consumers discovering faults and claiming redress after the previous deadline of 2 months is not high, considering that most faults are likely to occur once the consumer starts operating the product after buying it.
Remedies in case of lack of conformity	++ AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, HU, IT, MT, NL, PL, RO, SK, SE + IE, LV, SI, UK = EL, FR, LU, LT, PT	The compliance costs for businesses would increase due to increased requests from consumers to rescind the contract and refund the price. In the case of refund after termination of the contract, the loss is the sale price (plus returns handling) minus the remaining value of the goods returned. The loss in the case of replacement is considered to be the production cost of the replacement good concerned (plus returns management) minus the remaining value of the goods returned.	-- SMEs which currently rely on (multiple) repair can be more disadvantaged and may be more cautious to sell abroad using the optional Common European Sales Law, as distance consumers might be more likely to ask for a termination of the contract resulting in a refund (not accepting the inconvenience of lengthy repairs or waiting for a replacement).
DIGITAL CONTENT PRODUCTS			
'Cost-free' products	+ DE,FR, HU,IT, NL, PL	Businesses providing 'cost-free' products would have additional costs as at present there are cases of defective cost-free products.	- Providers of 'cost-free' products might be unwilling to use the optional Common European Sales Law due to increased compliance costs. On the other hand they could benefit as more consumers would be more confident to download 'cost-free' products and as a result they would increase their profits (e.g. advertisements linked with cost- free products).
Sales remedies for digital content products	+ DE,FR, HU,IT, NL, PL	Businesses would have to bear some additional costs as their customers would be able to freely choose the remedy they prefer which is not the case in most MS at present.	- The additional compliance costs might deter companies selling digital content products from using the optional Common European Sales Law. However, these potential additional costs could be offset by savings due to expansion of cross-border trade and economies of scale (digital content products can easily be sold on the internet irrespective of national borders, therefore the expansion of cross-border trade in digital products is likely to be higher than for tangible goods).
Conformity in long term contracts	+ DE,FR, HU,IT, NL, PL	This provision does not involve a direct burden and cost but nevertheless might imply a burden for digital content providers. This burden would stem from the increased liability of digital content providers which as a result could increase the cost of after-sales services.	- The increase of costs for after-sales services might have a negative impact on the take-up of the optional Common European Sales Law. The impact is not expected to be significant as in contrary to tangible products, repair or replacement of digital products are not so costly.

SME PROTECTION PROVISIONS			
Provision	**Impact on the level of protection**	**Compliance costs for businesses**	**Impact on take-up of the optional Common European Sales Law by SMEs**
Duty to disclose information about goods and services	+ BE, ES, FI,FR, IT, NL, PL = EE, HU, PT, DE	Businesses might incur some minor administrative costs for providing information on their products. It could however, be expected that similar information is already provided in the usual course of business.	+ In general, businesses would be in a better position to judge the characteristics of the products they purchase in advance of concluding a deal. This information would enable them to select the products that mostly suit their needs.
Duty to ensure that information supplied is correct	+ BE, ES, FI, IT,PL, PT, UK = EE	Some additional costs may be incurred by businesses to adapt the information materials to make sure that the information supplied is correct and is not misleading. In the case of breach of this	= Businesses would receive complete and correct pre-contractual information that would facilitate the business' decision making process. The potential costs for

		duty the business would be liable for damages.	compensating damages would only affect traders providing incorrect or incomplete pre-contractual information to other parties.
Unfair exploitation	+ BE, ES, IT, PL, UK = EE, FI, PT	Businesses which exploit the other party's situation by taking an excessive benefit or unfair advantage would need to change their businesses practices. These costs are considered as minor as the required standard would correspond to normal business practice.	+ SMEs would be particularly interested in taking up the optional Common European Sales Law as they are often the weaker party and are more likely to fall victim of unfair exploitation.
Unfairness control of standard terms	+ BE,ES, FI, FR, HU, IT, PL,UK = NL, DE	Businesses would no longer be reliant that their standard terms and conditions (which include some unfair terms) could be enforced and might be faced with some legal uncertainty. However the risk and costs are considered minor as including terms which deviate from good commercial practices or which are in contrary to good faith and fair dealing do not correspond to normal business practices.	+ SMEs would be particularly interested in taking up the optional Common European Sales Law, as they usually have less market power to oppose unfair terms or legal resources to identify them in a contract.
Terms which are unfair if not sufficiently drawn to the buyer's attention	+ BE, DE, FI , IT, PL, PT,UK = ES, EE - HU	Some additional costs as businesses supplying the terms to a contract would be obliged to take reasonable steps to draw the other party's attention to them, before or when the contract was concluded.	= Any additional costs are considered as minor as the reasonable steps to inform the other party about inserted terms would correspond to normal business practice.
Seller's right to cure for fundamental non-performance	+ BE, EE, ES,HU,IT,PL,PT, UK = FI	There could be some additional costs for buyers as the sellers would have the right to cure for non-performance whereas at present in some Member States a buyer can refuse the cure and opt for the recession of the contract.	-/ + The provision would be beneficial for sellers as they would have the opportunity to cure for non-performance and thus avoid additional costs if a buyer opts for the recession of the contract and compensation for damages. For buyers, the provision might have a negative impact on the take-up of the optional Common European Sales Law.

Legend for table: Impact of substantive provisions	
++ positive impacts	- - negative impacts
+ limited positive impacts	- limited negative impacts
= neutral, no impacts expected	

While most of the provisions lead to an increase in the level of protection compared to the existing acquis and the national laws of a representative selection of MS, the analysis found that they strike a reasonable balance. Traders from those MS where the level of protection is overall lower, may face moderate additional compliance costs. For some provisions such as remedies in cases of lack of conformity or interpretation in favour of consumers, the additional compliance costs might impact negatively on the take-up of the optional Common European Sales Law in MS where the level of consumer protection is lower. However, the optional Common European Sales Law would be voluntary and companies would use it only if the benefits (e.g. lower transaction costs) outweigh possible higher compliance costs.

Social impacts: Compared to the BS, this option would help to facilitate cross border trade and as a result would create 159,300-315,900 new jobs in the EU if 25% of companies used the optional Common European Sales Law.[185] With regard to impacts on fundamental rights, this option would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality, in line with Article 21(2) of the Charter of Fundamental Rights of the EU.

185 See Annex IV.

Environmental impacts: This would be dependent upon the number of businesses who use the optional Common European Sales Law, as an increase in use of transport for delivery would lead to an increase in CO2 and other vehicle emissions and would increase the cost to control pollution due to the binding EU rules.

Simplification potential: For businesses, this option would simplify the regulatory environment, eliminating the need for research of different national laws as only one regulatory framework need be used. Consumer representatives voiced the concern that consumers could be subject to a new unfamiliar system.[186] To aid the consumers' understanding of the optional Common European Sales Law, a standardised information notice would be presented to them alerting them of the use and implications of an optional Common European Sales Law.

Online environment: Compared to the BS, this would be a more simple[187] way to conclude a contract and give a trader cost savings. The additional transaction costs would no longer apply: Businesses would not need to adapt their terms and conditions and IT platforms to take into account the laws of all Member States they trade with. This could provide an incentive to businesses to increase their online cross border sales (or in some cases to commence them). If there were an increase in the number of businesses who used this instrument to trade cross border, then compared to the BS, this option would help towards narrowing the gap between domestic and cross border online sales.

However, an instrument dedicated only to e-commerce could lead to increased legal complexity. Companies using distribution channels other than e-commerce would have to apply different legal rules depending on the distribution channel used. This would create a fragmentation of the market and distort competition. Furthermore, as mentioned by business representatives in their Green Paper consultation responses,[188] it would not be technologically neutral and thus may generate legal uncertainty should new forms of distance sales occur in addition to e-commerce, for instance mobile telephony commerce. A scope limited to cross-border online sales only could however also create additional legal complexity for consumers who could be subject to different rules depending on whether they make a purchase online, at a distance using another method (i.e. post or telephone) or face-to-face.

Impact if this option is applied in a domestic and cross border contract as well as cross border only

Domestic and cross border: An optional Common European Sales Law would facilitate the legal environment for businesses which trade both cross-border and domestically, if they chose to operate under the optional Common European Sales Law for all contracts. On the one hand, if the optional Common European Sales Law also applied in a domestic context it would go beyond what would be necessary to resolve the problem of additional transaction costs and legal complexity. It would therefore not be a proportionate solution to the problem. On the other hand, several respondents to the Green Paper favoured this scope.[189] However as many respondents who favoured this scope, also favoured a cross border only scope. Therefore a more pragmatic solution may be to allow MS the choice as to whether they would also like the optional Common European Sales Law to apply in domestic contracts too.

186 BEUC's response to the Green Paper, p. 15.

187 Allen and Overy, Online Consumer Research, found that a relative majority of 46% of the surveyed consumers in the 6 largest MS would be more likely to buy online from another EU country if an EU-wide contract law was put in place.

188 Eurochambres response to the Green Paper, p.3, European Small Business Alliance response to the Green Paper, p.4.

189 Member States: EE, LT and NL. Stakeholders (business): BIPAR, EMOTA, UPSI, Eurochambres, EFBS, ICAEW, UEL, I.A.N.U.S., Allianz SE, Audi AG, LVMH, Nokia. Legal practitioners: CCBE, Bundesrechtsanwaltskammer, Scottish Law Commission, Ordre des Barreaux Francophones et Germonophone de Belgique, Deutscher Richterbund, Scottish Law Commission, Law Society of Scotland, Law Society of Ireland.

Cross border only: Traders could use one contract law (the optional Common European Sales Law) for cross border trade with multiple MS (both in B2C and B2B transactions). Thus, they could reduce transaction costs and legal complexity. Businesses could continue to use their national contract laws for domestic trade, whilst at the same time they would also be able to export using the optional Common European Sales Law if they wish to do so. Therefore, business could save costs when trading cross border and continue to enjoy their current arrangements under domestic legislation. A cross border only scope is in accordance with the principle of proportionality as the instrument does not go beyond what is necessary to achieve the objectives. Several respondents to the Green Paper,[190] who commented on this, favoured an instrument which was limited to cross border contracts (in some cases as a first step).

Overall assessment: This option would not replace existing domestic regimes, but complement the national law of MS, as it would be inserted into their national laws as an optional set of contract law rules which could be used for trading across borders. It need only be chosen by parties voluntarily only when it suits their interests.

The main advantage of this option is that it would eliminate the transaction costs which are incurred by businesses when trading with more than one MS. On a relative scale in comparison to annual turnover, this advantage would benefit trade for businesses performing B2C contracts and those B2B contracts which are between SMEs. As it would also offer cost savings to large businesses which contract with other large businesses, this combination for the application of the scope of the optional Common European Sales Law should not be ruled out. It could be left to MS to decide upon. The decrease in costs would provide incentives to increase trade which would result in more competition in the internal market. The increase in trade and competition would benefit consumers by giving them more product choice at a lower price.

There could be some administrative costs which arise from the need for businesses to provide information to consumers not previously required. These costs are however by far outweighed by the savings and the potential savings which are made from not paying the additional transaction costs for when a business trades with more than 1 MS. This option would create opportunities for legal practitioners to cater for new clients as law firms would experience an increase in demand by those expanding their cross-border trade and existing exporters wishing to use the optional Common European Sales Law.

Overall, this policy option meets the policy objectives as it reduces costs for businesses and offers a less complex legal environment for those who wish to trade cross border to more than one MS and at the same time it provides a high level of consumer protection, whilst simplifying the regulatory environment.

5.5. MAIN IMPACTS OF POLICY OPTION 5a AND 6[191]

5.5.1. Policy Option 5a: Directive on a mandatory Common European Sales Law (full harmonisation) and Policy Option 6: Regulation establishing a mandatory Common European Sales Law

190 Member States: AT, BG, EL, FI, DE, PL. Stakeholders (business): AMICE, FEDSA, APCMA, BdB, EuroCommerce, FAEP, CCIP, Bundesverband der Deutschen Industrie. Legal practitioners: CLLS, CNUE, Bundesnotarkammer, Österreichische Notariatskammer, DBF, Association of Spanish Property and Commercial Registrars, ELRA, UNCC. Stakeholders (consumer): VZBV, Belgian Consumer Organisation.

191 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

The end result of a full harmonisation Directive (once it has been implemented) and a Regulation replacing national laws would be very close in their outcome (although not exactly the same); therefore both these options are assessed together.[192] The instrument would allow businesses to use one set of rules in B2B and B2C contracts for both domestic and cross border trade[193] irrespective of the number of countries they trade with in the EU. It would also remove the necessity for businesses to investigate, compare and possibly adapt to several foreign laws.

Transaction costs: The instrument would considerably increase costs as it would also affect companies which do not wish to trade cross border. Companies that trade only domestically (17,136,213 in B2B and 4,420,563 in B2C) would face a one off instant cost of implementation of €208.8 billion[194] to use the new legislation. They would be required to pay these costs with no real financial gain, as the advantages would only be realised for those companies trading across a border.

All current exporters would face a one-off cost of implementation of €8.18 billion in order to use the new law.[195] The estimate of transaction costs do not include the potential higher compliance costs for companies in some Member States where the level of consumer protection would increase. There would not be an additional cost if a business were to export to more than 1 MS.

For example, the cost for a micro retailer to enter the whole of the EU market would be on average only 6.5% of its turnover[196] which would be the same as it would have cost to trade with only 1 MS in the BS. This option would result in costs savings for new exporters and for current exporters who would expand their cross-border sales to new countries. The annual savings for new exporters would be between €0.63-1.6 bn.[197] In addition, similarly as under option 4 the current exporters that would start trading with additional countries would save at least between €3.7 billion and €4.3 billion.[198] The potential benefits of this option would however not outweigh the initial one-off adaptation cost even over a longer time span.

The reduction in transaction costs would also facilitate intra-EU trade by removing obstacles for those companies which currently experience difficulties in either conducting cross-border trade or transferring, for example, property by way of cross border sales and would therefore facilitate the exercise of these rights in line with Articles 16 (Freedom to conduct a business) and 17 (Right to property) of the Charter on Fundamental Rights of the EU, respectively.[199]

Administrative costs (these are included in the transaction costs above): The instrument would create an additional cost for 22 million companies (including for those who trade only domestically) in the EU with an average one-off cost per company amounting to €2,500 for those performing a B2C contract and €1,500 for those performing a B2B contract. Compared to the BS, to trade with 2 MS the cost saving per company would amount to €1,500.[200]

Competition in internal market and impact on consumer prices (B2B and B2C): The instrument would increase competition in the internal market and lead to a decrease in prices. For B2C contracts 40%[201] of the above mentioned businesses surveyed said that if they were able to choose a single

192 For simplicity the Directive and Regulation are referred to collectively as the 'instrument'.

193 Article 16 of the Charter of Fundamental Rights of the EU. See Annex IV.

194 Businesses who trade only domestically, multiplied by the relative individual one off costs for B2B and B2C.

195 All exporters in B2B and B2C multiplied by the respective costs. Per business this would be €9,100 for B2C (plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs) and €9,800 for B2B as in the BS.

196 See section 2.3.2 on problem definition.

197 Number of new exporters annually multiplied by the average saving – see Annex III.

198 -See Annex III.

199 See Annex VI.

200 See Annex VII for more details.

201 EB 321, p. 36.

European contract law they would increase their cross border trade in the internal market. For those performing B2B contracts, this figure was 34%.[202] These surveys have also indicated that 14% of those performing B2B contracts would trade with 6 or more additional countries if they were able to choose a single European contract law, 34% said they would trade with 3-5 new countries and 35% said they would trade with 1– 2 new countries. For those performing B2C contracts these figures were: 18%, 32% and 32% respectively.

An increase in cross border trade would lead to a rise in imports, which would be likely to increase the competition in the importing MS. The higher competition would encourage businesses to become more innovative and improve the quality of their products or to reduce prices in order to stay competitive. This would contribute towards the Commission policy on increasing competitiveness[203] and would be of particular relevance in B2B transactions which include the manufacturing industry. Consumers would benefit from an increased choice of product at a lower price. The reduction for the average consumer price level would range between 0.14% - 0.28%.[204]

Impact on GDP: Overall EU GDP is expected to increase by €20- €40 billion (0.17-0.33%).[205] (See Annex IV).

Impact on third countries: Third countries trading with the EU would bear some one-off implementation costs, but could benefit from an easier access to the EU market as a whole in the long term. Third countries may be able to expand exports to more EU countries.

Impact on consumer protection: The instrument would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[206] and would also increase consumer certainty and therefore confidence, as consumers would have the same rights when shopping cross border.[207]However, it would also replace national laws and could lead to changes to the level of protection consumers in certain MS enjoy. While the consumer would benefit from an increase in the protection for a number of provisions, some consumers could lose protection in specific cases compared to their existing national law as their national law would have to be changed.

Impact on SMEs: For businesses trading cross border, this impact would be the same as PO4. However the instrument would also place administrative costs on domestic businesses who do not wish to trade cross border. This would have a particular impact upon micro and small enterprises and comparative to their turnover, would weigh more heavily (compared to the BS). These SMEs would be required to pay these costs with no real financial gain, as this advantage would only be realised for those companies trading across a border.

Impact on law firms: There would be an increase in the demand for legal services, as more businesses would need to understand how to use the instrument even for those advising on domestic transactions. There would be training costs for law firms as they familiarise themselves with the changes in their national law. The concerns highlighted by legal stakeholders in the UK in PO4 are most relevant here as the contract laws among MS would be harmonised and comparative advantages of a specific law like common law as a popular option for choice of law would be fundamentally diminished.

202 EB 320, p. 33.

203 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage,' COM (2010) 614.

204 See Annex IV.

205 See Annex IV.

206 See Annex VI.

207 Allen and Overy, Online Consumer Research, found that a relative majority of 46% of the surveyed consumers in the 6 largest MS would be more likely to buy online from another EU country if an EU-wide contract law was put in place.

Impact on Public authorities: MS: The national laws of MS would be affected as this instrument would require a complete overhaul of the domestic legislation. MS would bear the costs which would accompany the implementation of EU legislation (such as consultation of stakeholders, printing of new legislation, educating the public about the new law, time and cost of legislative process, etc.) MS' governments are likely to find the instrument (to change domestic legislation for contract law in such a fundamental way) to be politically sensitive. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with principle of subsidiarity or proportionality.

Judiciary: The judiciary of MS would need to familiarise themselves with the new instrument, this would mean a substantive financial cost for training. A single body of rules would remove the necessity for judges to investigate foreign law and compare several laws. This would decrease litigation costs (compared to the BS) and could in time alleviate the administrative load on a MS judicial system.

ECJ: In the first instance national courts would rule upon cases and submit summaries which would be entered into the Commission created database. These summaries are likely to lead to a defacto convergence of rulings by national courts which national judges would be able to access when needing to refer to how provisions of the optional Common European Sales Law have been ruled upon. There may be a limited number of cases which may need to be referred to the ECJ,[208] which would increase the caseload. There would be a financial cost of referral of a case which would need to be borne by the parties to the trial.

Analysis of provisions of instrument: The same impacts as PO4 but in contrary to PO4, the additional compliance costs would affect all 22 million EU companies.

Social impacts: The instrument is expected to create between 650,000 and 1.3 million new jobs.[209] However this positive impact of job creation is likely to be counteracted by the costs incurred by all companies and may lead to some initial decrease in employment, which only at a later time would be compensated due to the positive effects on the economy stemming from the rise in intra-EU trade. With regard to impacts on fundamental rights, this option would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality, in line with Article 21(2) of the Charter of Fundamental Rights of the EU.

Environmental impacts: The instrument would have an adverse impact upon the environment as an increase in trade would increase the use of transport for delivery. This would lead to an increase in CO2 and other vehicle emissions and would increase the cost to control pollution due to the binding EU rules.

Simplification potential: Compared to the BS, this instrument would simplify the regulatory environment as the differences between the contract laws of MS would be eliminated.

Online environment: If the instrument applied to an online cross border and domestic environment only, it would give a trader cost savings as the additional transaction costs would no longer apply. Businesses would not need to adapt their terms and conditions and IT platforms to a great degree to trade in another country. This could provide an incentive to businesses to increase or commence online cross border sales. However, legal complexity for businesses and for consumers could increase as different rules would apply to differing distribution channels. This would not be

208 This increase of caseload would form a minor part of the ongoing overall institutional and budgetary discussion of the of the resources and responsibilities of the ECJ.

209 GTAP model, see Annex IV.

technologically neutral and could distort competition if new forms of distance sales were used in addition to e-commerce.

Impact if the instrument is applied cross border only: Traders could use one contract law for cross border trade with multiple MS (both in B2C and B2B transactions) and reduce transaction costs. With a cross border scope only, the instrument would comply with the subsidiarity principle as the problem of additional transaction costs arises when businesses export.

However, the instrument would not comply with the proportionality principle as it would go beyond what is necessary to solve the problem. The instrument would replace all national contract laws in relation to cross border contracts. All exporting firms would *have* to use the instrument in their cross border contracts (rather than having a choice to). Those firms who are already exporting would mandatorily have to adapt their contracts to the new instrument – even if they have no desire to enter a new market - and incur once again the additional transaction costs. These transaction costs (€8.18 billion for all current exporters) above would apply to all exporting firms. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with principle of subsidiarity or proportionality.

Overall assessment: Compared to the BS, the instrument would remove obstacles to cross border trade in the internal market as the transaction costs for cross border trade would be diminished. The instrument would facilitate trade and could make it easier for businesses to expand across borders, as they would only need to use one set of rules. There would be an increase in the level of consumer protection allowing consumers to have more confidence to purchase across border and give them increased access to goods. In the longer term, legal practitioners would benefit as they would experience an increase in demand by new clients who would need to understand the instrument for domestic and cross-border contracts. However, it is likely to lead to a loss of income for UK law firms in the area of provision of legal advice on Common law to businesses if these companies chose to obtain legal advice in the United States.

The instrument would have very substantial costs attached to it: Although the transaction costs for cross border trade would no longer exist, businesses which only trade domestically would face a very substantial cost to use the new instrument without an added value. A cross border only scope would not be a proportionate solution as businesses who do not want to use it would have to adapt their contracts and incur transaction costs. MS would be likely to find this option politically very difficult to agree and to implement as it would eliminate domestic laws and legal traditions. The majority of MS who responded to the Green Paper consultation rejected this option outright. Overall, although the instrument would harmonise existing contract law legislation and eliminate transaction costs, it would create other substantive costs – which would not only be of monetary value. Therefore from a holistic perspective, taking all the costs (monetary or otherwise) into account, these costs outweigh by far the benefits of the instrument.

5.5.2. Main Impacts Of Policy Option 5b: Directive on a mandatory Common European Sales Law (minimum harmonisation)[210]

As this option is in the form of a minimum harmonisation Directive, MS could implement legislation beyond the consumer protection level of the Directive. As experience with existing minimum harmonisation Directives shows, the level of implementation could maintain a considerable number of differences in national contract laws.

210 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

This option would to a certain extent reduce transaction costs and increase the level of consumer protection. However, as set out in PO 5a and 6, there would be a very substantial one-off cost borne by all traders (both domestic and cross border) as they would have to adapt their contracts to use the new law. This cost would affect all companies, irrespective of their desire to trade cross-border. In addition, due to the nature of minimum harmonisation, there would still be some extra costs for businesses when trading cross border to consumers, these would arise from the necessity to research the levels of consumer protection in other MS. Therefore, whilst there may be a worthwhile investment for B2B cross border transactions, those performing B2C cross border contracts as well as trading only domestically would have to pay very substantial additional costs without a clear or even no added value. There would also be administrative costs which would arise from the need for businesses to comply with the Directive, these costs would affect all companies. Because this option would add to the issues set out in the problem definition it is highly unlikely to be suitable as a solution, and therefore is only summarised here. The full text of the analysis of this option can be found in Annex V.

6. COMPARATIVE ASSESSMENT OF OPTIONS

The 'comparison of policy options' table below provides a comparative overview of the policy options, showing the extent to which each of the options is expected to contribute to the policy objectives and their key impacts. These impacts are described below.

Policy option 1 - Baseline Scenario
This does not remove additional transaction costs for businesses trading cross-border, or reduce the level of legal complexity experienced by them. This option would also mean that the uncertainty consumers experience about their rights in a cross-border context would remain and the practice of refusal to sell across border would not decrease. Even though this option takes account of full harmonisation of some consumer protection rules due to the adoption of the CRD, this harmonisation is restricted to only a few selected areas of consumer contract law. Some key aspects of consumer contract law, such as sales remedies, would remain fragmented across the EU. This fragmentation would not give consumers the full confidence on all their consumer rights for when they purchase across border. As MS implement EU legislation and retain different national laws in the non harmonised areas for the whole life cycle of a contract, with no EU action these differences between MS would continue.

Policy option 2a – Toolbox as a Commission document
Compared to the BS this option may to a very small extent help to facilitate the expansion of cross-border trade in the internal market. It may also to a small extent indirectly lead to an increased level of consumer protection in national contract laws. However, since the contract law related transaction costs would largely remain unchanged, the positive impacts of this option on businesses and consumers would be minimal. In turn, so would any subsequent impacts upon trade, competition and the internal market. Moreover, any impacts of this option would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time to achieve. As there is no way of knowing whether and how widely this option would be used and accepted by Council and EP, the impacts of this option would not differ greatly compared to the BS and any impacts felt would be very small and would take place in the longer term.

Policy option 2b – Toolbox as an inter institutional agreement
As this option involves all three Institutions agreeing to make use of the toolbox, this option would, to a limited, but somewhat greater extent compared to PO2a, reduce the differences between national contract laws which would help to facilitate the expansion of cross-border trade in the internal market. This option could to a limited, but greater extent than PO2a indirectly lead to a higher level of consumer protection and legal certainty about consumer rights. However, since the toolbox would only be used for the amendment of existing or preparation of future sectoral legislation, contract law

related costs stemming from differences of national contract laws would largely remain and in turn so would any subsequent impacts upon trade, competition and the internal market. Similar to PO2a, there would not be any immediate impacts of this option upon businesses and consumers as negotiations for new legislation or an amendment to existing legislation would take time to achieve. As this option would only concern national contract law rules which are modified following revised or new EU legislation and would only have an impact at the earliest at a medium term, the overall positive impacts of this option would be, albeit greater than PO2a, still rather limited.

Policy option 3 – Recommendation

This option would only be effective if the Common European Sales Law was incorporated by a number of MS entirely and without amendment to the original version attached to the Recommendation. Only if all the MS did this, would it achieve a result like PO4. However, for both alternatives – for the latter even more than the former - it is highly unlikely that this would occur. This would not greatly affect traders performing a B2B contract as they would have the freedom to decide on the law applicable to their contract. Therefore, these traders would have the opportunity to reduce their transaction costs by using the Common European Sales Law of one MS which has best implemented it. The same would not be the case for traders performing B2C contracts, as they would have to research whether and where MS have changed the drafting of the Common European Sales Law with regards to mandatory consumer protection rules. This means that businesses would not be able to sell across borders to consumers on the basis of one single law and would therefore incur transaction costs of the type indicated in the BS. Consequently this option would only to a limited extent remove the hindrances to cross-border trade identified in the problem definition.

Because of the piecemeal way in which the Common European Sales Law could be incorporated if at all, this option would further complicate the regulatory environment for both consumers and businesses. Both parties would be subject to differing degrees of the Common European Sales Law in different MS and the divergences in national contract laws would remain. In addition, the voluntary nature of the incorporation would mean that the instrument would not be legally binding and there would be no jurisprudence mechanism to ensure its uniform application. As this option would add to the issues set out in the problem definition it is highly unlikely to be suitable as a solution.

Policy option 4 – Optional Common European Sales Law

This option would not replace existing domestic regimes, but complement the national law of MS: It would be inserted into their national laws as an optional set of contract law rules which could be used for trading across borders. It need only be chosen by parties voluntarily only when it suits their interests. The optional Common European Sales Law would very considerably reduce the transaction costs for businesses and offer a less complex legal environment for those who wish to trade cross border to more than one MS. The decrease in costs would provide incentives to increase trade which would result in more competition in the internal market. The increase in trade and competition would benefit consumers by giving them more product choice at a lower price. It would increase the level of consumer protection thereby increasing confidence to shop abroad whilst simplifying the regulatory environment.

This option would mainly be of benefit for businesses who perform B2C contracts and SMEs who perform B2B contracts as:

- For B2C contracts, the optional Common European Sales Law would be the only applicable law in the area covered by its scope. Therefore, for across the EU, the business would no longer have to consider other national mandatory provisions as they would normally have to when concluding a contract with a consumer from another MS.
- For B2B contracts, the cost savings – in particular for micro and small companies - would be disproportionately high. In addition, for SMEs, the negotiation of an applicable law between a similar sized company may not be so relevant.

Cost savings may also be made for those large businesses that contract with other large business. To ensure all businesses have the opportunity to take full advantage of the optional Common European Sales Law, it may be opportune to allow MS to make the choice as to whether large businesses could use the optional Common European Sales Law to contract with other large businesses.

This option does not replace existing domestic regimes and is therefore less politically sensitive. If it applied in a cross border only context it would be a proportionate solution to the problems identified; those businesses who wished to continue to use their national contract laws for domestic trade would be free to do so; whilst at the same time they would also be able to export using the optional Common European Sales Law. However this option would also further facilitate the legal environment for businesses if it applied to both domestic and cross border contracts. As Green Paper respondents were mixed in their responses to the scope of the optional Common European Sales Law (domestic and cross border or cross border application only), a proportionate solution, could be to allow MS the choice as to whether they would also like the optional Common European Sales Law to apply in their domestic contracts too.

Some administrative burdens could arise from the need for businesses to provide information to consumers not previously required. However, they are by far outweighed by cost savings. Contrary to PO5a and 6 it would only affect those companies who choose to use the instrument and not all enterprises. This option meets the policy objectives as it reduces costs for businesses and offers a less complex legal environment for those who wish to trade cross border to more than one MS. At the same time it provides a high level of consumer protection and reduces uncertainty about consumer rights in cross-border shopping , whilst simplifying the regulatory environment.

Policy option 5a – Full harmonisation Directive and policy option 6 - Regulation establishing a mandatory Common European Sales Law

Compared to the BS, transaction costs for cross border trade would be diminished as there would be no differences in contract laws and no legal complexity. The instrument would facilitate trade and could make it easier for businesses to expand across borders, as they would only need to use one set of rules. Consumers would have more access to goods, be more certain of their rights and feel more confident to shop cross border.

Compared to PO4 the instrument would however have substantial costs attached to it: Although the transaction costs for cross border trade would no longer exist, businesses which only trade domestically would face a substantial cost to use the new instrument without an added value. The instrument would not comply with the proportionality principle as it would go beyond what is necessary to solve the problem. The instrument would replace the national contract law both in relation to domestic and/or cross border contracts. All domestic firms and/or those who are already exporting would mandatorily have to adapt their contracts to the new instrument – even if they have no desire to enter a new market. This would mean they would incur the additional transaction costs once again.

MS would be likely to find this option politically very difficult to agree and to implement as it would eliminate domestic laws and legal traditions. The majority of MS who responded to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with the principles of subsidiarity and proportionality. Overall, although the instrument would harmonise existing contract law legislation and eliminate transaction costs, it would create compared to PO4 - other substantive costs which would not only be of monetary value. Therefore from a holistic perspective, taking all the costs (monetary or otherwise) into account these cost outweigh by far the benefits of the instrument.

Policy option 5b – Minimum harmonisation Directive establishing a mandatory Common European Sales Law

Compared to the BS, this option would to a certain extent reduce transaction costs and increase the level of consumer protection. However, as set out in options 5a and 6, there would be a very substantial one off cost borne by all traders (both domestic and cross border) as they would have to adapt their contracts to use the new law. This cost would affect all companies, irrespective of their desire to trade cross-border. In addition, due to the nature of minimum harmonisation, there would still be some extra costs for businesses when trading cross border to consumers, these would arise from the necessity to research the levels of consumer protection in other MS.

Therefore, whilst there may be a worthwhile investment for B2B cross border transactions, those performing B2C cross border contracts as well as trading only domestically would have, compared to PO4, to pay very substantial additional costs without a clear added value. There would also be administrative costs which would arise from the need for businesses to comply with the Directive; these costs would affect all companies. Similar to PO5a, MS would be likely to find this option politically very difficult to agree and to implement as it would eliminate domestic laws and legal traditions. It could also lead to a loss of income for law firms in the area of provision of legal advice of a specific law if companies chose to obtain legal advice elsewhere. The majority of MS who responded to the Green Paper consultation rejected this option outright. Although this option would minimally harmonise existing contract law legislation and civil codes and reduce transaction costs for some traders, it would add to the issues set out in the problem definition as some costs for researching the law would still remain. Therefore from a holistic perspective, taking all the costs (monetary or otherwise) into account the costs outweigh by far the benefits of the instrument.

Comparative assessment

The comparative assessment shows that that PO4 (optional Common European Sales Law), PO5a (full harmonisation Directive) and PO6 (Regulation) both establishing a mandatory Common European Sales Law) would best meet the policy objectives. Transaction costs and legal complexity in cross-border trade would be reduced for business. Consumers would be more certain about rights due to the high level of consumer protection available under these options. Therefore, they would be more confident to shop cross-border and would benefit from better choice and prices.

However, PO5a and PO6 create a substantial burden for businesses as all companies would need to adapt to a new legislative framework. The costs for the one off implementation for companies are particularly significant when compared to the other policy options because they would be felt by all traders (22 million companies) in the EU. These costs in total would amount to €217 bn. In particular, they would create a financial burden which will not be compensated by any benefits for the companies who only trade domestically and for whom cross border transactions costs do not create a problem. Taking account of the costs compared to the benefits, PO5a and PO6 are not proportionate solutions to the contract law related obstacles to cross-border trade. In addition to the monetary costs, MS would be likely to find these policy options politically very difficult to agree and implement as they would eliminate domestic laws and legal traditions. Almost all MS who responded to the Green Paper consultation rejected these options outright.

Preferred policy option

The preferred policy option is therefore option 4 which would meet the policy objectives in terms of reducing legal complexity and transaction costs, it would also simplify the current legal environment. The current legal framework is patchy and does not contain a comprehensive set of uniform rules for B2B and B2C contracts. An optional Common European Sales Law would introduce such a set of rules for both types of contract without interfering with national laws. This option would also ensure a high level of consumer protection which would increase consumer certainty and confidence about rights in cross-border shopping. It would contribute to the cross-border trade and competitiveness of the EU economy and would benefit the consumer by greater choice of products and better prices. As this option would be chosen voluntarily by businesses, it would not impose additional burdens but bring significant cost savings for companies extending their trade cross-border. In comparison to PO5a and PO6, the one off implementation cost would be much lower: €1.89 - €3.78 bn for PO4 compared to €217 bn for PO5a and PO6.

Scope of application of the preferred policy option

The problems of transaction costs and legal complexity have a particular impact upon businesses who perform B2C contracts (as they would have to consider the different national mandatory provisions when concluding a contract with a consumer from another MS) and SMEs who trade with other SMEs (as the costs to trade to more than 1 MS are high in relation to turnover, in particular for micro and small companies). As the optional Common European Sales Law would be of a distinct benefit to businesses performing B2C contracts and SMEs performing B2B contracts, this would be the preferred scope of application. However, large businesses that contract with other large businesses may want to have the choice of using the optional Common European Sales Law if they can also make cost savings. Therefore MS ought to have the choice as to whether large businesses could use the optional Common European Sales Law to contract with other large businesses.

In addition, the preferred scope would also be for the optional Common European Sales Law to apply to cross-border only situations as this is where the problems of additional transaction costs and legal complexity arise. This would correspond closest to the principles of subsidiarity and proportionality as it would address the problem of lowering barriers to cross-border trade without interfering in national rules. However to address the issue of this option also facilitating the legal environment for businesses if it applied to both domestic and cross border contracts (taking account of mixed responses to the Green Paper), and ensuring proportionality, MS ought to have the choice to apply the optional Common European Sales Law in their domestic contracts if they wish to.

Legend for tables: Comparing policy options & Effectiveness in meeting the objectives and key impacts:	
+++ : very positive impacts	- - - : very negative impacts
++ : considerable positive impacts	- - : considerable negative impacts
+ : limited positive impacts	- : limited negative impacts
0 : no impacts expected	

Effectiveness in Meeting the Policy Objectives and Key Impacts							
	PO1 Baseline Scenario (BS)	**PO2a Commission's toolbox**	**PO2b Inter-institutional agreement**	**PO3 Recommendation**	**PO4 optional Common European Sales Law**	**PO5b Minimum harmonisation Directive**	**PO5a full harmonisation Directive& PO6 Regulation**
Business Objectives							
Reduce transaction costs for cross-border trade	-- Baseline transaction costs in B2C: €8,695-€9,565 per company per MS. Baseline transactions costs in B2B: €9000- €10,568 per company per MS.	-- Very little change compared to the BS.	- Little change compared to the BS.	0 Very limited, highly unlikely	+++ Elimination of transaction costs for cross-border trade. One-off costs for familiarising and compliance with a new legal regime.	+ Positive, but limited effect depending on variances in implementation. One-off costs for familiarising and compliance with a new legal regime. Positive effect by far outweighed by substantial increase in costs for domestic traders.	+ Elimination of transaction costs for cross-border trade. One-off costs for familiarising and compliance with a new legal regime. Positive effects outweighed by substantial increase in costs for domestic traders.
Reduce legal complexity in cross-border trade	--	- Very little change compared to the BS.	0/+ Little change compared to the BS.	0/- Very limited, highly unlikely	+++ Positive impact, one legal regime that could be chosen for all cross-border transactions.	+ Positive, but limited effect depending on variances in implementation.	+++ Positive impact, the same law applicable in the whole of the internal market.
Consumer Objectives							
Reduce uncertainty about consumer rights in cross-border shopping	--	- Very little change compared to the BS.	0 Little change compared to the BS.	0/+ Very limited, highly unlikely	++ Uniform optional rules for all cross-border transactions with clear rights for consumers.	+ Positive, but limited effect depending on variances in implementation	+++ Uniform, mandatory rules applicable to all cross-border transactions.
Increased consumer protection	-	0 Very little change compared to the BS.	0/+ Little change compared to the BS.	+ Very limited, highly unlikely	++ Consumer protection increased compared to BS.	+++ Consumer protection increased compared to BS. MS could go beyond the minimum rules.	++ Consumer protection increased compared to BS.

Comparison of Policy Options

	PO1 Baseline Scenario (BS)	PO2a Commission's toolbox	PO2b Inter-institutional agreement	PO3 Recommendation	PO4 optional Common European Sales Law	PO5b Minimum harmonisation Directive	PO5a full harmonisation Directive & PO6 Regulation
Key Economic Impacts							
Administrative costs	-- In B2C €10,000 average per company and €11,664 additional for a company selling via e-commerce) In B2B €6,000 average per company	Same as BS.	Same as BS.	0/+ Positive, but very limited impact depending upon the number of MS who incorporate the Common European Sales Law and variances in implementation.	- In B2C €3,000 average per company. In B2B € 1,500 average per company. Number of companies affected: 571,685 (B2C) and 240,737 (B2B)	-- In B2C € 2,500 average per company. In B2B €1,500 average per company. All traders affected (22 million companies) and additional costs for companies exporting (as under the BS)	-- In B2C € 2,500 average per company. In B2B €1,500 average per company. All traders (22 million companies) affected.
Competition in internal market and impact on consumer prices	-- Competition in the internal market remains limited. Businesses deterred from trading cross-border.	- Very little change compared to the BS.	0 Little change compared to the BS.	0/+ Positive, but very limited impact depending upon the number of MS who incorporate the Common European Sales Law and the number of businesses who use it.	+++ Positive impact due to an increase of cross-border trade. Increased competition is likely to decrease consumer prices.	+ Little change compared to the BS as the differences between contract laws are likely to remain.	++ Cross-border trade is likely to increase but the positive effect on competition is reduced due to additional costs on business when trading domestically.
Impact on SMEs	--Transaction costs weigh, in relative terms, more heavily on micro and small businesses.	- Very little change compared to the BS.	0 Little change compared to the BS.	0/+ Positive, but very limited depending upon the number of MS who incorporate the Common European Sales Law and variances in implementation.	+++ Positive impact due to elimination of cross border transaction costs that weigh heavily on SMEs	+ Positive, but limited impact as transaction costs only reduced for B2B contracts. For B2C transaction costs would still occur, plus domestic SMEs would face substantive cost to use new law.	0 Positive impact of elimination of transaction costs for cross-border trade is outweighed by costs incurred by all companies that will need to adapt to a new legal framework.
Social Impacts							
	No impact	No impact	No impact	0/+ Positive, but very limited impact depending upon the number of MS who incorporate the Common European Sales Law and the number of businesses who use it.	++ Positive impact due to an increase in cross-border trade that would result in increased employment	+ Limited positive impact as the cross-border trade would only slightly increase.	- Positive impact for cross-border trade is outweighed by costs incurred by all companies that may lead to some initial decrease in employment.
Environmental Impacts							
	No impact	No impact	No impact	0/- Very little change compared to the BS.	- Some impact upon environment due to increase in transport.	-- Adverse impact upon environment due to increase in transport.	-- Adverse impact upon environment due to increase in transport.

Table 4: Cost/benefit comparison of Policy Options

Table 4 summarises the costs/benefits[211] of policy options 1, 4 and 5a and 6.[212] The estimates are based on the low and medium scenarios of the cross-border trade increases as described in Annex IV.[213]

Due to a substantial one-off cost imposed on all existing companies, the results of PO5a and PO6 would be dependent upon future GDP growth and may result either in a benefit of €105 bn or a loss of up to €57 bn. PO4 would be the most beneficial for the economy over the next 10 years as there would be a benefit in a range between €32 bn and €149 bn.

	Annual GDP increase	Employment effect	Annual transaction costs214	One-off implementation cost for companies	Costs/ Benefits (10 years)
Option 1	0	0	€ 1 - 2 bn	0	€ (-16) to (-8) bn
Option 4	€ 5 - 20 bn	160 000 - 640000	€ 0.85 - 1.2 bn	€ 1.89 - 3.78 bn	€ 32 to 149 bn
Option 5a/6	€ 20 - 40 bn	640,000 - 1,300,000	€ 0.3 bn	€ 217 bn	€ (-57) to 105 bn

7. MONITORING AND EVALUATION ARRANGEMENTS

MS will be required to send to the Commission notification measures. These measures will set out the text of the adopted legislation by the MS. The Commission will monitor these measures to ensure compliance with the preferred option.

The Commission will launch a monitoring and evaluation exercise to assess how effectively the Common European Sales Law will achieve its objectives. This exercise will take place 4 years after the date of application of the. The intention is for the exercise to precede and feed into a review process which will examine the effectiveness of the Common European Sales Law instrument.

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211 The calculations of the costs/benefits are based on the net present value (i.e. the value of future benefits evaluated in the present) of the difference between the annual GDP increase (calculated with the GTAP model, see Annex IV) and the annual transaction costs, minus the one-off implementation cost for current exporters (or for the whole economy for PO5a and PO6). This calculation takes place over a time span of 10 years, using a discount rate of 4% as indicated in the IA Guidelines, Annex XI. For example, if the GDP increase is €5 bn, the annual transaction costs €0.85 bn, the one-off cost €1.89 bn, and the discount rate 4%, the benefit for the society in 10 years is computed with the following mathematical formula: (5-0.85)/1.04 + (5-0.85)/1.042+(5-0.85)/1.043+…+(5-0.85)/1.0410 – 1.89 = 32.

212 The impacts of PO2a and PO2b are difficult to quantify as they would not have a direct impact. Concepts from the toolbox would be used for the development of future contract law legislation or the revision of existing EU legislation. The legislation itself would have the direct impact. The impacts of PO3 and PO5b could not be quantified due to several possible variants of implementations and their subsequent impacts.

213 In the low and the medium scenarios, it is assumed that intra-EU trade increases based on the replies of the businesses (EB 320 and 321) who were asked about the impact of an European contract law on their exports. In the low scenario intra-EU trade increases by 0.76% and in the medium one it increases by 1.53%. For PO4 low and high assumptions, of respectively 25% and 50%, of exporting companies using the optional Common European Sales Law are also considered. The break-even point for PO4, i.e. the moment in which the take-up of the optional Common European Sales Law starts to bring positive benefits to the economy, is just above 5%. This means that a minimum of 5% of current exporters would have to use the optional Common European Sales Law in order for this option to bring benefits to the economy. However, even in the case of a lower 'take up' rate of the optional Common European Sales Law, any loss would be smaller than the loss forecasted for PO1 as PO1 is equivalent to PO4 in the circumstances where nobody uses the optional Common European Sales Law. (This is computed setting the benefits to zero and checking the relative take-up percentage).

214 Administrative costs are included in the transaction costs for PO1 and one-off implementation costs for PO4 and PO5a/6.

The comprehensive statistics on cross-border trade in the EU and cross-border purchases by consumers are available in the Eurostat database which should be a primary source of data for the evaluation. Other suitable data collection tools could be in-depth interviews, surveys and a mystery shopper exercise. Depending on the cost-efficiency of the available monitoring options, these tools could be combined within a comprehensive market monitoring study.[215] Alternatively, the Commission may launch separate data collection initiatives on different indicators. For instance, the indicators for the achievement of business objectives could be assessed by means of Eurobarometer and the more specific SME Panel and European Business Test Panel surveys. The indicators for consumer objectives could be addressed by means of Eurobarometer surveys and a possible mystery shopper exercise examining the ease of access to cross-border offers. Based on the data on the indicators and information obtained from MS the Commission will assess the progress achieved and will evaluate the effectiveness of the Common European Sales Law instrument.

General business objective • Facilitate the expansion of cross-border trade in the internal market	**Indicators** • Variation in number of enterprises trading cross-border • Variation in average number of EU countries companies export to
Operational business objectives • Reduce transaction costs for cross-border trade	• Change in transaction costs per company trading in more than 1 MS under a Common European Sales Law • % of companies using the Common European Sales Law • Change in aggregate transaction costs of exporting companies within the EU
• Reduce legal complexity in cross-border trade	• Rate of importance that businesses assign to contract law related obstacles in cross-border trade
General consumer objective • Facilitate cross-border purchases by consumers in the internal market	• Variation of % of consumers shopping cross-border
Operational consumer objectives • Reduce level of uncertainty about consumer rights in cross-border shopping • Ensure high level of consumer protection	• Variation in consumer confidence in cross-border shopping • % of consumers who experienced refusal of cross-border offers

215 http://ec.europa.eu/consumers/strategy/facts_en.htm#In-depth (last visited: May 2011).

ANNEX I: PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Policy Background

With its 2001 Communication on European contract law,[216] the European Commission (Commission) launched a process of extensive public consultation on the problems arising from differences between Member States' contract laws and on potential actions in this field. As a follow-up, the Commission issued an Action Plan in 2003[217], with the intention among others to improve the quality and coherence of European contract law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation.

Via a grant under the 6th Framework Programme for Research, the Commission financed the work of an international academic network which carried out the preparatory legal research in view of the adoption of the CFR. This research work was finalised at the end of 2008 and led to the publication of the Draft Common Frame of Reference (DCFR)[218] as an academic text.[219]

The Stockholm Programme for 2010-2014[220] states that the European judicial area should serve to support the economic activity in the internal market. The Programme invited the Commission to examine further the issue of contract law. The Commission Work Programme 2010 provided for a communication on European contract law. Consequently, a 'Green Paper on policy options on progress towards a European contract law for consumers and businesses' (Green Paper) was published in July 2010. Following the publication of the Green Paper, the Commission's Work Programme for 2011 provided for a legal instrument of European contract law as a strategic initiative to be proposed in the last quarter of 2011. [221]

1.2. Organisation and timing

The Commission adopted a Decision[222] on 26 April 2010 to establish an Expert Group (EG). Its role was to produce a feasibility study of a 'user-friendly' instrument covering the life-cycle of a contract. The EG was composed of, former judges, academics, legal practitioners and representatives of consumer and business organisations (who acted in their personal capacity). The EG members also reflected the main legal systems and traditions within the EU. The EG feasibility study was completed at the end of April 2011. It supported the Commission's work in developing its proposal for a legal instrument of a Common European Sales Law for the EU.

An Impact Assessment Steering Group (IASG) was set up in May 2010. The participating Commission services included: the Secretariat General, the Legal Service, Directorate-General (DG) Competition, DG Communication, DG Economic and Financial Affairs, DG Internal Market and Services, DG Enterprise and Industry, DG Health and Consumers, DG Information Society and Media, DG Mobility and Transport, DG Trade. The IASG met 5 times and was consulted on the draft Green Paper on European contract law, on the impact assessment (IA) report as well as on the provisions of the Expert Group and the possible instrument of a Common European Sales Law for the EU.

216 COM(2001) 398, 11.7.2001.

217 COM(2003) 68, 12.2.2003.

218 Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Munich, Sellier, 2009.

219 Although financed by the Commission, the text is not an official Commission document.

220 Council Act, Stockholm Programme - AN OPEN AND SECURE EUROPE SERVING AND PROTECTING CITIZENS , (2010/C 115/01) of 2.12. 2009, No 17024/09.

221 Commission's Work Programme for 2011, COM(2010) 623 final of 27.10.2010.

222 Commission Decision 2010/233/EU , OJ 105 of 27.4.2010

1.3. Consultation and expertise

1.3.1. Public consultation

The Commission organised several general and targeted public consultations throughout the IA process.

- **General consultations**

- The **Green Paper** opened an EU wide public consultation on 7 policy options. It was launched on 1 July 2010 and closed on 31 January 2011.

The Commission received 320 responses from all categories of stakeholders from across the EU. The responses came from most Member States' governments (20), some Member States' parliaments (5), senates (2) and other government bodies (4); the European Economic and Social Committee; a large number of business organisations (137), several consumer organisations (18) and a Catholic NGO; many associations of legal practitioners (52); a considerable amount of academics (66) and a few individual businesses and citizens (14). Most responses came from respondents based in Germany (96), UK (47), Brussels (31), France (29) and Italy (25).

The number of responses shows a widespread interest for European contract law at all levels. While many respondents wanted to participate in the discussion, some felt unable to provide in depth comments given the rhythm of the progress of the work and that they did not know the detail of the policy options. A large number of respondents stressed the importance of the outcome of the impact assessment for their ultimate position.

With regard to the policy options set out in the Green Paper, many respondents saw value in the Green Paper option 1 (publication of the results of the Expert Group) and supported green Paper option 2 (a 'toolbox' for the EU legislator). However, there was little support for Green Paper option 3 (a Commission Recommendation).

With regard to Green Paper option 4 (an optional instrument of European contract law) the responses were more varied. Several Member States and a considerable number of other respondents – particularly business representatives, legal practitioners and academics – said they could support an optional instrument, provided that it fulfilled certain conditions (for example: had a high level of consumer protection, a clear and user-friendly nature, was clear about its link with the proposed Consumer Rights Directive and other EU-legislation). A large number of Member States and business representatives did not want to take a position at that time, because they did not know the detail of this option and the work of the Expert Group. Some respondents expressed a preference for Green Paper option 6 (a Regulation establishing a European contract law that would replace Member States' national contract laws). There was very little support for Green Paper options 5 (a minimum harmonisation Directive) and 7 (a Regulation establishing a European civil code).

Of those respondents to the Green Paper who commented on the scope of a European contract law instrument most only expressed opinions on a toolbox (Green Paper option 2) and an optional instrument (Green Paper option 4). Out of those respondents who made explicit comments concerning the scope of the toolbox, the majority believed it should be as comprehensive as possible, i.e. should not be restricted to certain types of contract and should have a rather broad scope. Out of those respondents who made explicit comments concerning the scope of the optional instrument, the majority seemed in favour of an instrument which focused on cross-border business to consumer (B2C) sales contracts.

Based on the stakeholder responses to the Green Paper several specific and general concerns relating to the creation of a European contract law could be identified. Different categories of stakeholders raised specific concerns. A number of Member States were concerned about business taking advantage of the weaker position of the consumer/SME, the reduction of the level of consumer protection and legal uncertainty. Some business representatives raised concerns relating to the increased legal uncertainty and an unbalanced high level of consumer protection which would be burdensome for business. On the other hand, consumer representatives insisted that any new regulatory or non-regulatory tool in the field of consumer policy should have a clear added value for consumers, as they feared a reduction of consumer protection levels in their Member States. They also expressed a specific concern relating to an optional instrument (Green Paper option 4), which they thought would lead to uncertainty and confusion for consumers. Associations of legal practitioners were concerned about an increase of legal complexity and uncertainty, largely due to the lack of accessible case law.

The Commission addressed all the abovementioned concerns. With regards to the concern of Member States and consumer representatives about a decrease in consumer protection, the Commission created a special sub-group within the Expert Group focusing on ensuring a high level of consumer protection. However, the Commission also took care that the level of consumer protection would be balanced with the needs of business. It invited both consumer and business representatives as part of the *key stakeholders expert group* (described in the paragraph below) to comment on a continuous basis on the work carried out by the Expert Group. This would ensure that the different views would be taken into account in the development of the substantive rules. Furthermore, the advice of the key stakeholder expert group was taken into account in order to ensure that the rules the Common European Sales Law for the EU proposal were user-friendly and practical. For this purpose, for instance a distinction between the rules for B2C and B2B was made. The Commission also addressed the specific concern by consumer organisations that an optional instrument (Green Paper option 4) would create uncertainty and confusion for consumers, as they would not be able to assess the implications of an optional instrument when it applied to a contract instead of their national law. If this option were chosen for the Commission proposal, the Commission would develop a standardised information notice, which businesses would have to provide to consumers when they used the optional instrument. This information notice would be available in all official languages of the EU, but would have the same content. It would inform the consumers in their own language that the Common European Sales Law applied and what their key rights under this law would be. At the same time, the information notice would reduce the administrative burden for businesses, as it will remove the need for each trader to individually explain the implications of the Common European Sales Law for the EU to consumers. The Commission also examined ways to minimise the legal uncertainty which would accompany the introduction of a Common European Sales Law for the EU. One solution could be the creation of a data-base on relevant future European and national case-law which would be accessible by legal practitioners from all Member States (i.e. judges, notaries, lawyers and legal advisors). For this purpose the Commission would explore the suitability of comparable databases (e.g. the JURE Database) and systems linking national authorities (e.g. the Internal Market Information System[223], European e-Justice Portal).

- A **key stakeholder experts group** was set up in September 2010. It included representatives of the main European organisations of business (Businesseurope, UEAPME, Eurocommerce, Eurochambres and the International Chamber of Commerce), consumers (BEUC), representatives of

223 Commission Staff Working Paper, Background information related to the strategy for expanding and developing the Internal Market Information System ('IMI'), Brussels,

21.2.2011, SEC(2011) 206 final, p. 9: European contract law is indicated as a potential area which could benefit from an extension of IMI to cooperation of national judicial authorities.

the legal professions of lawyers and notaries (CCBE and CNUE) and representatives from the banking and insurance sectors (EBIC and CEA).

The first role of the stakeholder group was to provide a practitioner's perspective on the work of the Expert Group, thereby ensuring the instrument developed was user-friendly and practical. The Commission organised 10 meetings during which the stakeholder group were continuously consulted on the draft chapters of the instrument developed by the Expert Group.

Once the concrete work on the preparation of the IA was launched, the stakeholder group discussed IA related matters at 5 of its meetings. The Commission presented the developments and asked stakeholders to comment on the main issues concerning the methodology of the IA study and the approach to the data collection, problem definition and the analysis of impacts of policy options in the IA report. The stakeholders' suggestions contributed to refining the methodology of the IA study, the development of the problem definition and the analysis of the impacts in the IA report.

- **Specific consultations targeting main stakeholder groups**

- A workshop with business stakeholders on potential benefits of a European contract law instrument from the perspective of large businesses and SMEs was organised in November 2010.

- Several surveys consulted businesses on their attitudes and experiences with problems related to contract law, and the impacts of an instrument of European contract law. Two Flash Eurobarometer surveys (EB 320/2011 and 321/2011) enquired about contract law related experiences of companies involved or interested in cross-border trade with businesses and consumers. The SME Panel survey conducted within the Enterprise Europe Network gathered responses from 1,047 micro, small and medium sized businesses, while a European Business Test Panel attracted responses from 378 companies of all sizes at the end of 2010.

- Targeted meetings with consumer stakeholders: took place between October and January 2010. Commission officials met representatives of BEUC and attended two meetings of the European Consumer Consultative Group (ECCG) to discuss the Green Paper and how it addressed consumer problems.

- A consumer survey (Flash Eurobarometer 299) enquired about consumer experiences with cross-border shopping and in particular problems related to contract law.

The survey results were used as data sources on business and consumer attitudes to contract law related problems and the assessment of policy options in the IA report. The Commission ensured that the specific concerns expressed by representatives of business, consumers and legal practitioner stakeholders during the consultation process were taken into account in the development of substantive provisions of the text drafted by the EG and in the IA. In particular, the comments, questions and suggestions of the stakeholder group were discussed and followed up by the EG.

1.3.2. Outside expertise

In November 2010 the Commission awarded a public tender to IBF International Consulting to carry out a study in the context of preparing the IA. The aim of the study was to assist the Commission in gathering further evidence on the problems identified and to carry out an economic analysis of the impacts of the main policy options set out in the Green Paper. The contractor carried out economic analysis and modelling, supplemented by in-depth interviews with representatives of business and consumer organisations and legal professionals. The draft final report of the study was submitted on 16 March 2011 and the final report was submitted in spring 2011.

ANNEX II: THE CURRENT LEGAL FRAMEWORK

1. Overview

The current legal framework in the area of contract law in the EU is characterised by the differences between the respective national laws of the Member States (MS).

The EU developed uniform conflict of law rules, which help determine which substantive laws apply to cross-border contracts. However, when it comes to the substantive laws, the current legal framework does not contain a single set of uniform substantive contract law rules which would cover a life cycle of a cross-border contract comprehensively. A patchwork of European and international rules has led to a limited approximation of national laws only in a few areas of contract law, as described in sections 2 and 3 below.

As a result, substantial differences between MS contract laws remain under the current legal framework. These differences in contract law are seen as a barrier to cross-border trade by business with a slightly higher impact on B2C transactions than in B2B transactions. [224]

- **Conflict of law rules**

The EU put in place uniform *conflict of law rules* on contractual[225] and non-contractual obligations[226] in order to improve legal certainty for cross-border contracts. Conflict of law rules allow contracting parties within certain limits to choose which law applies to their contract and which law applies in the absence of choice.

However, due to the nature of conflict of law rules, even uniform conflict of law rules cannot remove the differences between substantive contract law. They only lead to the application of a given substantive national law in cross-border transactions when otherwise several different national laws could potentially apply. This means that, no matter what the choice is, at least for one of the parties to a contract the applicable law is a foreign law. This party is therefore disadvantaged by the need to familiarise itself with a different legal system. This situation disadvantages both businesses and consumers who have to deal with unfamiliar foreign laws in cross-border transactions.

- **Substantive rules**

The EU has partially reduced the differences by harmonsation measures in some areas of contract law. The legal framework applicable to B2C contracts has been characterised by minimum harmonisation legislation at EU level. While the consumer acquis has led to an increase of consumer protection to the advantage of consumers, it does not completely eliminate the differences in national contract laws. MS still have the possibility to go beyond the minimum standards established by the consumer acquis. They can also legislate freely in the areas of contract law where no European legislation has been adopted.

The legal framework applicable to B2B contracts has been characterised by very limited harmonsation measures at European level. Uniform rules of a wider scope have been introduced through an instrument of international law, the 1980 UN Convention on the International Sale of Goods (Vienna Convention), which applies by default to cross-border B2B transactions. However,

224 See, for example, Eurobarometers 320 on European contract law in business-to-business transactions (EB 320) and 321 on European contract law in consumer transactions of 2011(EB 321): 32% in B2B and 36% in B2C of exporting businesses said that contract law difficulties were a barrier to cross border trade and were almost equally cited as other practical barriers such as language and delivery. See also the SME Panel, the EBTP, 2010 surveys, presented in Annex 3 and the Clifford Chance Survey in European Contract Law (2005).

225 Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (the Rome I Regulation).

226 Regulation (EC) No 864/2007 of the European Parliament and of the Council on law applicable in non-contractual obligations (Rome II Regulation).

as described below the instruments of international law are not comprehensive and have a number of other limitations. They are not widely used in practice, with less than 1 in 10 businesses saying that they frequently apply them in B2B cross-border transactions.[227]

2. Legal framework for business-to-consumer (B2C) contracts

While the overall legal framework for B2C contracts ensures an adequate level of protection for consumers who shop in their own country, it creates increased complexity and confusion for pro-active consumers who shop cross-border. Thus, it does not encourage consumers to seek better opportunities in the internal market. It mostly does not provide a uniform set of rules thereby creating the necessary consumer confidence. It also creates increased complexity and costs for businesses interested in selling to consumers across border.

a) Conflict-of-law rules. The Union put in place uniform conflict-of-law rules which cover B2C contracts. These rules aim to protect consumers in situations where the business pursues its commercial activities or directs this activity to the country of habitual residence of the consumer. In practice, whether the business directs its activity to the consumer's country has to be determined on a case-by-case basis.[228] This is particularly relevant for e-commerce transactions where it may not be obvious to which countries a business advertises and markets through its web-site.

Thus, in the absence of a choice of law, in a situation described in the paragraph above, the law of the consumer's country of habitual residence applies (Article 6(1), Rome I Regulation). If the parties choose a law other than the law of the country of the habitual residence of the consumer – in practice mostly the seller's law - according to Article 6(2) of the Rome I Regulation, the contract cannot deprive the consumer of the mandatory protection afforded by his or her country. Thus, consumers can be confident that they will benefit from at least the same level of protection as guaranteed in their country of residence.

Practically, the Rome I Regulation does not provide an appropriate level of protection to the pro-active consumer who shops cross-border as it only grants the consumer the protection of the mandatory rules of his own national law in cases where the trader directs its activities[229] to the MS where the consumer is domiciled. If the trader does not envisage doing business with consumers from another MS, but agrees to contract with them if they contact him on their own initiative, the consumers do not benefit from the protection rules of their national law. These consumers fall under the general choice-of-law rules according to which parties are free to choose the applicable law, which will lead in practice mostly to the application of the seller's law. In the absence of choice, the law of the seller applies anyway. This means that consumers who want to take advantage of the internal market and want to buy something in another country out of their own initiative are disadvantaged compared to those consumers who are contacted by a foreign trader in their own country.

227 EB 320, p. 27.

228 In the recent Pammer & Alpenhof judment of 7 December 2010 (Joined cases C-585/08 and C-144/09) the Court of Justice established criteria for assessing whether a business directs its country of residence. However, as these criteria require a case-by-case analysis a degree of uncertainty about the level of consumer protection in cross-border trade remains.

229 The concept of "commercial or professional activities directed to the consumer’s domicile", has been clarified by the Cort of Jutsice in the Pammer/Alpenhof judgment of 7 December 2010 (Joined cases C-585/08 and C-144/09).

b) EU consumer acquis: The consumer contract *acquis* consists of a number of Directives[230] mostly based on the principle of minimum harmonisation. The Directives on consumer contract law cover the areas of doorstep selling,[231] unfair contract terms,[232] distance selling[233] and sales and commercial guarantees.[234] As these Directives were harmonised at a minimum level, MS, in implementing their provisions into national laws, were allowed to go beyond them (only) in favour of the consumer. As MS used this possibility to differing extents, the result was an improvement of consumer protection in the EU, but also a patchy legal landscape.[235] As this legal situation was fragmented along national frontiers, it did not achieve the internal market integration that was also intended.

The Commission addressed the differences in the MS consumer contract laws by its 2008 proposal for a Consumer Rights Directive (CRD).[236] The CRD proposal was aimed at facilitating cross-border shopping and sales and up-grading core consumer rights by consolidating the existing legislation in the area of consumer contract law. This would have been achieved on the basis of a fully harmonised set of key consumer contract provisions of interest for the functioning of the internal market. To this end the initial proposal of 2008 aimed at revising the Directives on doorstep selling, unfair terms, distance contracts and consumer sales and commercial guarantees. These four Directives would be merged into a single horizontal instrument regulating the common aspects in a systematic fashion, removing inconsistencies and closing gaps.

However, two years of intense negotiations in the Council and European Parliament led to a considerable reduction of the scope of the CRD. Firstly, its application was generally limited to distance and off-premises contracts. Secondly, two out of the four areas included in the initial proposal were ultimately excluded from the Directive's scope, namely the rules on sales and unfair terms. The impossibility to agree on fully harmonised rules on sales and unfair terms highlighted the limits of a full harmonisation approach in core areas of national contract law.

In any case, even with these fully harmonised provisions in the CRD, there will be a need to apply them in conjunction with other national provisions of general contract law, for example on remedies for breach of information duties. Consequently, differences between the contract laws of the MS will remain even after the adoption of the CRD.

The Directive on electronic commerce limits itself to some contract law provisions,[237] which ensure that contracts concluded by electronic means are valid, that consumers are given certain pre-contractual information and that providers acknowledge receipt of the orders placed by electronic means.

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230 Council Directive 85/577/EEC of 20 December 1985 on contracts negotiated away from business premises, Council Directive 90/314/EEC on package travel, package holidays and package tours , Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts; Directive 97/7/EC of the European Parliament of and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts distance contracts; of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services; Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers.

231 Council Directive 85/577/EEC of 20 December 1985 aims to protect the consumer in respect of contracts negotiated away from business premises.

232 Council Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

233 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

234 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

235 The "EC Consumer Law Compendium"(up-dated version of 2007 covering all 27 MS) shows to what extent MS have made use of minimum clauses and options when transposing consumer acquis. The Consumer Law Compendium is a comparative study on the implementation of 8 consumer Directives in the legislation of MS, carried out by the University of Bielefeld, on request by the European Commission. The Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final of 08.02.2007, acknowledges that the minimum harmonisation directives have led to a fragmentation of national laws, p.6.

236 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614, 8.10.2008.

237 Article 9, 10 and 11 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

3. Legal framework for business-to-business (B2B) contracts

The legal framework for B2B contracts lacks a comprehensive set of uniform rules and is characterised by the need to negotiate applicable law in cross-border contracts. The negotiations often disadvantage SMEs, which frequently have to apply an unfamiliar law of their business partner. Even though the Vienna Convention, introduced a uniform set of rules, it is not comprehensive and has several limitations which have led to its limited use.

a) Conflict-of-law rules. For B2B contracts, uniform choice of law rules stipulate that the parties are free to choose the applicable law, with a very limited number of exceptions. In practice however, where there is a considerable difference in bargaining power between the parties to a contract (e.g. often between a big company and an SME) the applicable law is generally imposed by the party with more bargaining power. If both parties have a comparable negotiating power, for instance two small companies in a cross-border region, the negotiations may be difficult for both of them. In contracts between SMEs of comparable bargaining power the need to negotiate the applicable law may be a significant obstacle for both parties, as none of them may be familiar and willing to accept the law of the other partner.[238] One in two respondents to the SME panel survey indicated that they saw negotiations on applicable law as an obstacle to cross-border trade. [239]

a. EU acquis substantive rules The Directive on electronic commerce contains some pre-contractual information requirements for contracts concluded online.

The Directive on combating late payments[240] applies only in B2B transactions and harmonises the rules on the default interest rate which apply in cases of late payment. It also contains a test of unfairness of contractual terms relating to stipulated interest rates. However, MS may continue to maintain or to bring into force rules which are more favourable to the creditor than the provisions of the new Directive. Experience with the predecessor Directive on combating late payments has shown that MS made use of the possibilities to depart from the miniumum standards established and by consequence the implementing rules across the EU were not uniform.[241] Thus, even though there are harmonised rules on late payments at the EU level, businesses still have to familiarise themselves with potential differences in the respective national laws.

c. International substantive law. The Vienna Convention is an international convention which most of the MS have ratified. It is by default the applicable law in B2B cross-border sales contracts whenever the parties have not excluded its application.

However, the Vienna Convention does not apply uniformly in the EU. Firstly, it has not been ratified by Ireland, Malta, Portugal and the UK. Secondly, there is no single court which would ensure its uniform interpretation. Furthermore, the Vienna Convention covers only some issues of general contract law, notably the rules on formation of contracts, as well as sale-specific provisions. Therefore, it leaves many potential disputes relating to other matters of general contract law to be solved by the national law applicable according to conflict of law rules.

The UNIDROIT Principles of International Commercial Contracts can be incorporated into B2B contracts. However, the non-binding nature of these principles as well as the absence of a

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238 See response to the Green Paper by the Scottish Law Commission, p. 5

239 55% of the respondents to the SME Panel Survey indicated that "Difficulties in negotiating with the other contractual party on applicable contract" were an obstacle in cross-border trade.

240 The Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast)

241 An analysis of the implementation of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payments in commercial transactions showed that some Member States have gone beyond the minimum standards established by the Directive. For instance, on the implementation of Article 3(1)(d) on the interest for late payment, see: Study on the effectiveness of EC legislation on combating late payment (2006), p.140-143 available at http://ec.europa.eu/enterprise/policies/single-market-goods/files/late_payments/doc/finalreport_en.pdf and Impact Assessment accompanying the Proposal for a Directive of the European Parliament on combating late payment in commercial transactions (recast) SEC(2009) 315, p. 6.

mechanism of uniform interpretation contribute to its limited success in day-to-day commercial transactions.

Among others, the abovementioned difficulties lead to a situation, where in practice these instruments are not frequently applied.[242]

4. Limitations of the current legal framework

The current legal framework in the EU does not contain a single set of uniform and comprehensive contract law rules which could be used by consumers and businesses in cross-border trade.

As illustrated in Table 1 , the current legal framework consists of a patchwork of contract law rules, introduced via different instruments limited only to some of the key areas of contract law. They include some fully harmonised rules, but also a number of minimum standards and gaps in the EU acquis which allow for differences in the laws of MS to evolve.

Table 1 illustrates key areas of contract law covering the life-cycle of a contract.[243] It shows that the existing *acquis* and international rules are limited in scope: out of the 13 key contract law areas they only cover six for B2C (one only partially) and eight areas for B2B contracts (one only partially). As demonstrated by Table 1 the current legal framework lacks a uniform set of rules that would cover the whole life cycle of a contract both for B2C and B2B cross-border transactions comprehensively. The remaining differences in contract laws continue to generate obstacles to the smooth functioning of the internal market both on the demand and supply side.

242 In EB 320, 2011: only 9% of respondents said that their cross-border contracts are mainly covered by international instruments such as the Vienna Convention and UNIDROIT Principles.

243 The Expert Group created by the Commission identified these areas as key areas of contract law for cross-border contracts.

Table 1: EU legal framework in the area of contract law

Contract law area	Consumer Rights Directive	Other relevant EU consumer legislation	Directive on electronic commerce	Directive on electronic commerce	Directive on combating late payments	Vienna Convention on the international sale of goods
Pre-contractual information and negotiation	YES	YES	YES	YES	NO	NO with a few exceptions
Conclusion of contract	NO	NO	YES (partially)	NO	NO	YES
Rights to withdraw	YES	YES	NO	NO	NO	NO
Defects in consent	NO	NO	NO	NO	NO	NO
Interpretation	NO	NO with one exception	NO	NO	NO	YES
Contents and effects	NO	NO	NO	NO	NO	NO with a few exceptions
Unfair contract terms	NO	YES	NO	NO	YES (partially)	NO
Obligations and remedies of the parties to a sales contract	NO	YES	NO	NO	NO	YES
Delivery and Passing of Risk	YES	NO	NO	NO	NO	YES
Obligations and remedies of the parties to a related service contract	NO	NO	NO	NO	NO	NO
Damages, Stipulated payments for non-performance and interest	NO	NO	NO	NO	YES (partially)	YES
Restitution	NO	NO	NO	NO	NO	YES
Prescription	NO	NO	NO	NO	NO	NO

5. The added value of a Common European Sales Law

A Common European Sales Law would add value to the current legal framework as it would introduce a uniform set of contract law rules which cover the life cycle of a contract comprehensively. These rules would be the same for all economic operators in the EU who use them, irrespective of the MS where they are based. Common European Sales Law rules could be used both for B2C and B2B transactions within its scope.

As these rules would cover the whole life cycle of a contract they would address the main problems which could practically affect a cross-border transaction.

The feasibility study developed by the Expert Group the Commission created contains rules for the key contract law areas. They cover the lifecycle of a contract and the main contractual problems which may occur within a cross-border transaction. The feasibility study could serve as a basis for developing the substantive rules of a Common European Sales Law instrument.

Table 2 illustrates how a Common European Sales Law (see respective columns) fits into and completes the gaps within the current legal framework. It shows that the scope of a Common European Sales Law will cover the whole life cycle of a contract comprehensively.

Table 2: Common European Sales Law and the current legal framework

B2C CONTRACTS					**B2B CONTRACTS**			
Contract law area	**Consumer Rights Directive**	**Other relevant EU consumer legislation**	**Directive on electronic commerce**	**Common European Sales Law**	**Common European Sales Law**	**Directive on electronic commerce**	**Directive on combating late payments**	**Vienna Convention on the international sale of goods**
Pre-contractual information and negotiation	YES	YES	YES	YES	YES	YES	NO	NO with a few exceptions
Conclusion of contract	NO	NO	YES (partially)	YES	YES	NO	NO	YES
Rights to withdraw	YES	YES	NO	YES	YES	NO	NO	NO
Defects in consent	NO	NO	NO	YES	YES	NO	NO	NO
Interpretation	NO	NO with one exception	NO	YES	YES	NO	NO	YES
Contents and effects	NO	NO	NO	YES	YES	NO	NO	NO with a few exceptions
Unfair contract terms	NO	YES	NO	YES	YES	NO	YES (partially)	NO
Obligations and remedies of the parties to a sales contract	NO	YES	NO	YES	YES	NO	NO	YES
Delivery and Passing of Risk	YES	NO	NO	YES	YES	NO	NO	YES
Obligations and remedies of the parties to a related service contract	NO	NO	NO	YES	YES	NO	NO	NO
Damages, Stipulated payments for	NO	NO	NO	YES	YES	NO	YES (partially)	YES

non-performance and interest								
Restitution	NO	NO	NO	YES	YES	NO	NO	YES
Prescription	NO	NO	NO	YES	YES	NO	NO	NO

6. Consistency of the Common European Sales Law instrument with the existing legal framework

A Common European Sales Law instrument would be consistent with existing European legislation in the areas it covers. Consistency is achieved by taking into account the relevant existing rules of the EU acquis in the legal areas a Common European Sales Law instrument would cover.

Fully harmonised rules of the EU acquis are taken over completely. For instance, a Common European Sales Law instrument would take over the fully harmonised rules on pre-contractual information for distance and off-premises contracts from the CRD. The benefit of this approach is that businesses would have to comply with the same rules they anyhow have to observe according to their domestic legislation. In addition, a Common European Sales Law instrument could not be used to circumvent otherwise applicable national rules implementing the respective Directives.

Rules of the EU acquis which have been harmonised at a minimal level are taken as a basis. However, in a number of cases the respective provisions of a Common European Sales Law instrument could go beyond the minimum standards of the *acquis*. For instance, the rules on sales remedies have been harmonised at a minimum level by the Consumer Sales Directive. A Common European Sales Law instrument could provide for a higher level of consumer protection by giving consumers a free choice of remedies for defective products (as opposed to the hierarchy of remedies established by the Consumer Sales Directive. However, as opposed to the differing MS laws implementing the Directive, the rules on sales remedies would be regulated in a uniform way under a Common European Sales Law instrument. Consumers would benefit from a higher level of consumer protection. The benefit for business would be that they could operate based on the same rules in all MS when using the Common European Sales Law instrument.

Consistency of a Common European Sales Law instrument with all relevant legislative instruments would also be ensured in the long term. To this end, the review of the Common European Sales Law instrument would take into account the potential future changes in relevant European legislation.

The existing instruments of international law have also been taken into account in the process of developing a Common European Sales Law instrument. For instance, the Vienna Convention and the UNIDROIT Principles were among the sources which inspired the work of the Expert Group created by the Commission. Based on the lessons learnt from the use of the Vienna Convention, as well as other existing instruments of international law, a Common European Sales Law instrument could go beyond or build upon the existing international standards, to the extent improvements are necessary.

- **Relationship with the Consumer Rights Directive**

A number of stakeholders, in particular business representatives, have pointed out the importance of ensuring the consistency[244] between a Common European Sales Law instrument and the Consumer Rights Directive (CRD) and that the two instruments work in tandem.[245] Indeed, a Common European Sales Law instrument and the CRD are interlinked, as they address similar problems and largely pursue the same objectives for B2C transactions. Both instruments address the fragmentation

244 Response to the Green Paper, for instance by UEAPME, p.2-3.

245 Responses to the Green Paper, for instance by Business Europe, p. 2.

of the legal framework in the area of B2C contracts and the resulting problems of the business' and consumers' reluctance to engage in cross-border trade and reap the benefits of the internal market.

However, a Common European Sales Law instrument and the CRD have a different scope. A major difference is that the CRD only covers B2C contracts, while a Common European Sales Law instrument would also contain rules on B2B contracts. Furthermore, the CRD only covers three key areas of consumer contract law (pre-contractual information, right of withdrawal and delivery/passing of risk). While a Common European Sales Law instrument would also cover these areas, it would also contain rules in 10 additional areas of contract law. Finally, the CRD generally applies to distance and off-premises contracts, while a Common European Sales Law instrument would apply to all transactions, irrespective of the distribution channel.

Consistency between the two instruments has to be ensured in the areas where the two of them overlap, i.e. the two instruments largely overlap in the areas of pre-contractual information, right of withdrawal and delivery and passing of risk.

ANNEX III: CALCULATION OF OPPORTUNITY AND TRANSACTION COSTS

1. Opportunity costs for intra-EU trade

Eurobarometer surveys (EB) were used to find out *if* and *to what extent* companies were dissuaded from exports due to contract law related barriers. In response to the question "how often contract law related obstacles deterred the company from conducting cross-border transactions", respondents could answer "always", "often", "not very often" "never", "do not know".[246] The percentage of companies which were deterred from cross-border trade can be established based on these responses. However, in order to identify the frequency and number of failed transactions more precisely, some assumptions need to be made. The cumulative amount of failed transactions can be expressed as opportunity costs. It represents the forgone trade for the EU economy due to contract law related barriers.

The calculation of opportunity costs in the main IA report depends on the assumptions on the weighting of the qualitative answers indicating the frequency as "often" or "not very often" of failed transactions of the surveyed enterprises which were dissuaded from trade due to contract law from various degrees. Table 1 presents the full range of assumptions to quantify "often" and "not very often". It shows the opportunity costs for intra-EU trade which does not take place due to contract law related problems. In order to identify how often transactions fail due to this reason a frequency going from 0 to 100% is attributed to a "company often deterred due to contract law" and to a "company not very often deterred due to contract law". 0% means that the potential opportunity cost generated by enterprises which are not deterred in every transaction, but only in some ("often" and "not very often"), are not taken into account. The table also reflects the theoretical values up to 100% as a weight (which would mean that all the trade of those companies who were deterred "often" or "not very often" is considered as a missed opportunity), even though this is not a realistic scenario.

Table 1: Opportunity costs for businesses: intra-EU trade not made - different weights (€ billion)

Weight for "not very often" (β) → Weight for "often" ↓(α)	0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%
0%	26	68.4	110.8	153.2	195.6	238	280.4	322.8	365.2	407.6	450
10%	36.4	78.8	121.2	163.6	206	248.4	290.8	333.2	375.6	418	460.4
20%	46.8	89.2	131.6	174	216.4	258.8	301.2	343.6	386	428.4	470.8
30%	57.2	99.6	142	184.4	226.8	269.2	311.6	354	396.4	438.8	481.2
40%	67.6	110	152.4	194.8	237.2	279.6	322	364.4	406.8	449.2	491.6
50%	**78**	**120.4**	**162.8**	**205.2**	**247.6**	290	332.4	374.8	417.2	459.6	502
60%	**88.4**	**130.8**	**173.2**	**215.6**	**258**	300.4	342.8	385.2	427.6	470	512.4
70%	**98.8**	**141.2**	**183.6**	**226**	**268.4**	310.8	353.2	395.6	438	480.4	522.8
80%	**109.2**	**151.6**	**194**	**236.4**	**278.8**	321.2	363.6	406	448.4	490.8	533.2
90%	**119.6**	**162**	**204.4**	**246.8**	**289.2**	331.6	374	416.4	458.8	501.2	543.6
100%	130	172.4	214.8	257.2	299.6	342	384.4	426.8	469.2	511.6	554

When 0% is the weight for both "often" and "not very often" the opportunity cost is considered to be only the one generated by the 0.96%[247] of involved or interested in cross-border trade companies that

246 EB 320, EB 321.

247 EB 320 European contract law in business-to-business transactions, 2011: 3% of companies that consider contract law as a barrier in cross-border trade (out of 32 % of companies which see contract law as a barrier to B2B transactions = 0.96% of all companies) are always deterred from cross-border trade for this reason. It is assumed that

are "always" deterred from cross-border transactions due to contract law. The opportunity costs for this group of companies amount to €26 billion.

However, this estimate does not take into account the opportunity costs for companies who are deterred by contract law obstacles "often" or "not very often". The highlighted weights in the table are the most realistic assumptions for the values of "often" and "not very often". Respectively, "often" is placed between 50% and 90%, of the cases and "not very often" between 0% and 40% of the cases. However, the table illustrates all possibilities between the minimum and maximum.

The calculation of opportunity costs for intra-EU trade is based on the value of total intra-EU trade estimated by Eurostat at €2704 billion in 2008.[248] The value of forgone intra-EU trade is calculated as a percentage of the actual trade value, as follows:

*€2704 billion (total trade in goods intra-EU in 2008) * 32% of companies (exporting or interested in exporting) who see contract law as a barrier to cross-border trade * 3% of companies* ***always***[249] *deterred from cross-border trade due to contract law (= €26 bn)*
+
α[250] *€2704 billion * 32% of companies (exporting or interested in exporting) who see contract law as a barrier to cross-border trade * 12% of companies* ***often***[251] *deterred from cross-border trade due to contract law (=* ***α*** ** €104 bn)*
+
β[252] *€ 2 704 billion *32% of companies (exporting or interested in exporting) who see contract law as a barrier to cross-border trade * 49% of companies* ***not very often***[253] *deterred from cross-border trade due to contract law (=**β** * €424 bn)*

= opportunity costs

Summarising the above: *€26 billion +* ***α*** *(€ 104 billion) +* ***β*** *(€ 424 billion) = opportunity costs.*

Each box of table 1 represents this formula for different values of ***α*** and ***β***[254]. The most plausible ones are in bold.

The assumptions on the values of "often" and "not very often" underlying the calculations used in the IA report are:

- For the high estimate: ***α*** (the value for often) = 70% and ***β*** (the value for not very often) = 20%.
- For the low estimate: ***α*** = 0 and ***β*** = 0, since only companies who were always deterred by contract law were considered and those who were deterred partially were disregarded. This estimate is very conservative.

companies deterred from trade due to contract law would represent the same share in exports. That is, the calculations assume that the 0.96% of companies that are always deterred by contract law differences would, in the absence of these differences, account for 0.96% of exports.

248 Eurostat Statistical Books, External and Intra-EU trade – a statistical yearbook, 2009 edition, p. 82.

249 EB 320 European contract law in business-to-business transactions, 2011: 3% of companies that consider contract law as a barrier in cross-border trade (out of 32 % of B2B transactions) are always deterred from cross-border trade for this reason.

250 Assumed numerical expression to quantify the frequency of "often", as illustrated by the figures in table 1.

251 EB 320 European contract law in business-to-business transactions, 2011: 12% of companies that consider contract law as a barrier in cross-border trade (out of 32 % of B2B transactions) are often deterred from cross-border trade for this reason.

252 Assumed numerical expression to quantify the frequency of "not very often", as illustrated by the figures in table 1.

253 EB 320 European contract law in business-to-business transactions, 2011: 49% of companies that consider contract law as a barrier in cross-border trade (out of 32 % of B2B transactions) are not very often deterred from cross-border trade for this reason.

254 The weight for "always" is implicitly equal to 100%.

The quality of the results does not change significantly, depending on whether the figures of companies deterred from B2B or B2C trade are used.[255] For simplicity in the calculations, only the figures for B2B are used, as they are the decisive variable for the estimate of opportunity costs.[256]

These opportunity costs show the lost value of cross-border trade for companies which were dissuaded from cross-border trade due to contract law. In part these costs will be reduced due to the domestic transactions which may take place instead of the failed cross-border ones.[257] It is hardly possible to quantify the value of the domestic transactions which compensate for failed cross-border trade. This data is not available. However, it is plausible that the compensatory domestic trade most likely takes place at a higher price and is detrimental to consumers, especially when they cannot purchase certain products at a higher price.

2. Transaction costs at company level

The average costs per company concluding a transaction under a foreign applicable law are calculated on the basis of the results of about 1400 responses to two independent surveys: the SME[258] and European Business Test Panel[259] surveys. The SME[260] and the EBTP[261] surveys were the most suitable data collection tools for obtaining the necessary data, as they allow respondents sufficient time to prepare, before giving the answers. Therefore, it was possible to ask precise questions, for instance on monetary ranges of costs savings. The Eurobarometer surveys (EB 320 and EB 321) which could provide more representative results than the SME and EBTP surveys, were not suitable for asking precise questions. Since the EB 320 and 321 were conducted over the phone, the respondents did not have sufficient time to prepare the answers in advance. Since, it was very likely that respondents would say they "did not know" the answer to a precise question, they were usually asked to give a general qualitative reply.

Since the sample of responses to the SME panel was more representative than the one of the EBTP survey, the calculations of transaction costs were carried out based on the SME panel survey and the results were verified by calculations based on the EBTP. As indicated below, the findings of the two surveys are similar.

2.1. Costs in B2B transactions

The results of the SME panel survey on cost ranges are summarised in Table 2. Based on the responses of individual companies average transaction costs were estimated.

There are 136 companies which indicate the costs of cross-border transactions due to differences in contract law to be lower than €5,000; 109 companies indicate these costs as being in the range of €5,000 - €10,000; 45 companies in the range of €10,000-€15,000; 23 companies in the range of €15,000-€30,000 and 27 companies estimate the costs to be more than €30,000.

255 Based on EB 320 (Q3) and EB 321 (Q3), the percentage of exporting of interested in exports companies deterred from cross-border trade can be identified; always deterred: 0.96% of total trade for B2B, 0.72% for B2C; often deterred: 3.84% B2B and 5.04% B2C; not very often: 15.68% B2B and 14.76% B2C.

256 B2C cross-border trade represents only 0.44% of the overall EU trade, calculated based on figure on cross-border shopping under EB 298: 211.7 million of households * 25% purchasing abroad * € 800 average yearly expenditure = € 42.3 billion. 72% of this is purchased on holidays, business or shopping trips. The pure cross-border distance trade is € 12.1 billion. So, out of the € 2,705 billion of international trade, B2C represents 0.44%.

257 The estimate does not reflect cross-border trade which failed for other reasons than contract law. It also does not take into account the domestic transactions which could compensate the failed cross-border trade.

258 Results available at: http://ec.europa.eu/justice/policies/consumer/docs/report_sme_panel_survey_feb_2011_en.pdf

259 Results available at: http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european_contract_law/report_en.pdf

260 The responses to the SME Panel survey are usually collected through face-to-face interviews or written questionnaires.

261 The EBTP survey is conducted by means of a written questionnaire, which respondents are asked to fill in online; See brochure on EBTP at http://ec.europa.eu/yourvoice/ebtp/docs/brochure/ebtp-brochure-a4_en.pdf

Table 2: Businesses involved in B2B transactions – SME panel survey

Question: If you could use a single European contract law in transactions across the EU, please estimate the cost savings from saved transaction costs (for example legal fees, research and translation of foreign law) for expanding your activity in one additional EU country?

	Number of firms involved only in B2B	Number of firms involved in both B2B and B2C	Total businesses involved in B2B transactions
a. Less than € 5 000	85	51	136
b. € 5 000-10 000	65	44	109
c. € 10 000-15 000	22	23	45
d. € 15 000-30 000	16	7	23
e. More than €30 000	17	10	27
f. Don't know	159	110	269
Firms that gave an answer (other than "f")	205	135	340
Number of firms	364	245	609

Based on these numbers the average costs associated with B2B transactions are calculated within a low and high estimate.

- The low estimate:

The costs are estimated at the average value[262] (i.e. €2,500, €7,500, €12,500, €22,500 and €30,000) of the indicated transaction costs by companies.
*(2 500*136 + 7 500*109 + 12 500*45 + 22 500*23 + 30 000*27)/340 = €8,963*
Thus, based on the low estimate the average transaction costs for firms involved in B2B transactions (*all businesses involved in B2B transactions)* amount to €8,963.

- The high estimate:

As evident from Table 2, 27 firms indicate that transaction costs of entering one additional market are more than €30,000. For the calculation of a high estimate it is assumed that these costs are €50,000:
(2 500*136 + 7 500*109 + 12 500*45 + 22 500*23 + 50 000*27)/340 = €10,551
Thus, based on the low estimate the average transaction costs for firms involved in B2B transactions amount to €10,551.

Based on these two estimates it is assumed that B2B transaction costs range between €8,963 - €10,551. These costs are calculated on basis of the fourth column in Table 2 (*Total Businesses involved in B2B transactions)* which covers all firms engaged in B2B transactions. Some of these firms however indicate that they are also involved in B2C transactions. For this reason, the same calculation of transaction costs (as described above) is repeated for B2B considering *only* B2B transactions (column 2 in Table 2). For firms involved *only* in B2B transactions, transaction costs fall within a similar range of **€9,000 - €10,658.** The latter range is used for the calculations in the report, as it reflects more accurately the costs for companies involved in B2B transactions.[263]

2.2. Costs in B2C Transactions

Transaction costs for B2C are estimated in a similar way. For B2C transactions (Table 3) transaction costs amount to €8,876-€10,268.[264] For companies involved only in B2C transactions (Table 3, column 2) these costs are within a similar range and amount to **€8,695 - €9,565**[265]. The latter range is

262 €30,000 is taken as a conservative figure for the low estimate

263 This estimate deviates only marginally from the range between €8,963 - €10,551, which is based on the larger sample.

264 8,876 = (2 500 * 62 + 7 500 * 51+12 500 * 23 + 22 500 * 11 + 30 000 * 11) / 158 or 10 268 = (2 500 * 62 + 7 500 * 51 + 12 500 * 23 + 22 500 * 11+ 50 000 * 11) / 158

265 8 695 = (2 500 * 11+7 500 * 7 + 12 500 * 0 + 22 500 * 4 + 30 000 * 1) / 23 or 9 565 = (2 500 * 11 + 7 500 * 7 + 12 500 * 0 + 22 500 * 4 + 50 000 * 1) / 23

used for the calculations in the report, as it is more conservative and reflects more accurately the costs for companies involved in B2C transactions.[266]

Table 3: Businesses involved in B2C transactions – SME panel survey

Question: If you could use a single European contract law in transactions across the EU, please estimate the cost savings from saved transaction costs (for example legal fees, research and translation of foreign law) for expanding your activity in one additional EU country?

	Number of firms involved only in B2C	Number of firms involved in both B2C and B2B	Total Businesses involved in B2C transactions
a. Less than EUR 5 000	11	51	62
b. € 5 000-10 000	7	44	51
c. € 10 000-15 000	0	23	23
d. € 15 000-30 000	4	7	11
e. More than €30 000	1	10	11
f. Don't know	24	110	134
Firms that gave an answer (all rows except "f")	23	135	158
Number of firms interviewed (a+b+c+d+e+f)	47	245	292

2.2.1. Specific IT related costs in B2C transactions

Furthermore, specific contract law related IT costs may occur for businesses selling online to consumers in other EU countries. Business representatives assessed that the IT related costs stem from the need for a business to adapt its website to the legal requirements of each Member State it directs its activity towards.[267]

This assessment can be verified by an estimate based on the SME Panel survey, which also shows that the transaction costs are higher in B2C transactions, when a business sells online. While the average transaction costs in B2C transactions are estimated between €8,695 and €9,565 for companies selling online the average costs are €11,875 - €13,541. Therefore, both in the high and low estimate the additional costs for e-commerce amount to respectively €2,917 and €2,916. The costs are estimated based on the formula:
*additional contract law related IT costs * % of retailers exporting through e-commerce * average number of EU countries exported to.*

- **The EBTP panel survey**

As already mentioned, the EBTP survey was used as an additional independent data source, in order to verify the results of the SME panel.

The average transaction costs, based on Table 4, are similar to the costs calculated based on the responses to the SME Panel survey and fall within the range of €11,132 – €14,704. However, since the EBTP survey attracted a smaller sample of responses, it is only used as an additional source in order to verify the reliability of the SME Panel figures.

266 This estimate deviates only marginally from the range of €8,876-€10,268, which is based on the larger sample of companies (158) that declared doing business with both consumers and businesses. Furthermore it coincides with the estimates provided by the Federation of Small Businesses which estimated that for an SME engaged in cross-border B2C trade the transaction costs amount to €9,120 per Member State. In order to verify the accuracy of this estimate, the statistical standard error has been computed using a bootstrap analysis. It allowed drawing multiple samples from the sample that is actually available in order to test the robustness of the estimate. Computing 30,000 re-samples, bootstrap shows that, within a 95% level of probability, B2C transaction costs cannot be lower than €5,181 or higher than €1,4 292.

267 The costs include adapting the web-site so that it can recognise the consumer's country of residence and retrieve the correct set of pages. See Federation of Small Businesses (FSB) in the UK, Response to the Green Paper on policy options for progress towards a possible European contract law for consumers and businesses, p.3; see FSB Position Paper on Rome I, p.3 for detailed breakdown of costs.

Table 4: Businesses involved in B2B and B2C transactions – EBTP panel survey

Question: If you could use a single European contract law in transactions across the EU, please estimate the cost savings from saved transaction costs (for example legal fees, research and translation of foreign law) for expanding your activity in one additional EU country?

	Number of firms involved in both B2B and B2C
Less than € 1 000	15
€ 1 000 – 5 000	42
€ 5 001 – 10 000	36
€ 10 001 – 15 000	9
€ 15 001 – 30 000	13
More than € 30 001	25
Other	0
Don't know	69
Firms that gave an answer	140

3. Number of Member States EU companies export to

Eurobarometers 320 and 321 provide information about the number of EU countries where firms make cross-border transactions (EB 320, Q D6; EB 321, Q D5). It should be noted that the sample of EB 320 and 321 only includes companies with an interest or experience in cross-border trade. Table 5 and 6 present the results respectively for B2B and B2C transactions.

Approximately 26% of companies involved in B2B trade are engaged in cross-border transactions with only one EU country; 38% with 2-3 EU countries and 36% with four or more EU countries. A similar picture emerges from Table 6 on B2C trade. Approximately 86% of the interviewed managers indicate to be involved in cross-border B2C transactions. Around 26% serve consumers in only one EU country, 35% in 2-3 EU countries and 39% in four or more EU countries.

Table 5: Firms involved in B2B transactions.

D.6 Besides (your country), in how many other EU countries do you currently make cross-border transactions?			
	Number of all respondents	Share of all respondents (number of all respondents / f)	Share of all respondents exporting to a number of Member States (number of all respondents/g,, except rows a and e)
a. Domestic transactions only	518	8%	-
b. Trading with 1 other EU countries	1 489	23%	26%
c. Trading with 2-3 other EU countries	2 202	34%	38%
d. Trading with at least 4 other EU countries	2 072	32%	36%
e. Not answered	194	3%	-
f) Total number of interviewed firms (a+b+c+d+e)	6 475	100%	-
g) Total number of firms trading cross-border (b+c+d)	5 763	89%	100%

Source: Flash Eurobarometer 320.

Note: The survey is based on a random sample of 6,475 managers in 27 EU Member States. The sample includes only enterprises that are currently involved in cross-border B2B transactions (sales/purchase of goods or services) or are planning to do this in the future. The sample is randomly selected in each country within the following activity sectors: manufacturing; wholesale and retail trade; accommodation and food service activities; information and communication; financial and insurance activities.

Table 6: Firms involved in B2C transactions.

D.5 Besides (your country), in how many other EU countries do you currently make cross-border transactions?			
	Number of all respondents	Share of all respondents (number of all respondents / f)	Share of all respondents exporting to a number of Member States (number of all respondents/g, except rows a and e)
a. Selling only to domestic consumers	517	8%	-
b. Selling to consumers in 1 other EU country	1 422	22%	26%
c. Selling to consumers in 2-3 other EU countries	1 940	30%	35%
d. Selling to consumers in at least 4 other EU countries	2 198	34%	39%
e. Not answered	388	6%	-
f) Total number of interviewed firms (a+b+c+d+e)	6 465	100%	-
g) Total number of firms trading cross-border (b+c+d)	5 560	86%	100%

Source: Flash Eurobarometer 321.

Note: The survey is based on a random sample of 6,465 managers in 27 EU Member States. The sample includes only enterprises that are currently involved in cross-border B2C transactions (sales/purchase of goods or services) or are planning to do this in the future. The sample is randomly selected in each country within the following activity sectors: manufacturing; wholesale and retail trade; accommodation and food service activities; information and communication; financial and insurance activities.

An estimate of the number of Member States where exporting companies conduct cross-border transactions can be made on the basis of the above tables (considering points b, c and d.)

Thus, on average, companies involved in B2B transactions trade with 2.7-4.8 Member States:
*(1489*1+2202*2.5+2072*4) / (1489+2202+2072) = 2.7 (used in the low estimate) and (1489*1+2202*2.5+2072*10) / (1489+2202+2072) = 4.8 (used in the high estimate)*

Companies involved in B2C transaction trade on average with 2.7-5.1 Member States.
*(1422*1+1940*2.5+2198*4) / (1422+1940+2198) = 2.7 (used in the low estimate) and (1422*1+1940*2.5+2198*10) / (1422+1940+2198) = 5.1(used in the high estimate)*

4. Cumulative transaction costs for the EU economy

In order to find out the total transaction costs due to differences in contract law for the EU economy, the cumulative transaction costs for all exporters must be identified. A distinction between sectors is made in order to take into account the differences in B2C and B2B cross-border transactions for trade in goods. B2C transactions occur in the retail trade sector; B2B transactions occur in the sectors of manufacturing and mining, agriculture and wholesale trade.

For B2C transactions

The aggregate transaction costs in B2C transactions are the costs incurred by companies exporting to consumers (exporting retailers) in other EU countries. They include the transaction costs (e.g. for legal advice and translation of foreign laws), but also the additional contract law related IT costs which occur in B2C cross-border e-commerce transactions.

However, realistically not all exporters consult a lawyer on foreign law. EB 321 found that 17.6% of retailers currently involved in cross-border trade are not at all informed about the consumer protection provisions in the contract laws of the EU countries where they sell or wish to sell to consumers. It is reasonable to assume that these exporters have not consulted a lawyer on foreign law at all. Hence, only 82.4% (100% - 17.6%) of B2C exporters are included in the computation of transaction costs.

The cumulative transaction costs can be calculated based on the following formula:

*82.4% of exporting businesses informed about foreign law * (Transaction costs per company * number of exporting retailers in the EU * average number of EU countries European exporters trade with + contract law related IT costs for retailer exporting through e-commerce).*

To compute the cumulative IT related transaction costs for B2C traders, the number of retailers exporting through e-commerce is considered. Eurostat Information Society Statistics[268] provide answers to the question "have you done electronic sales to other EU countries?" for companies having more than 10 employees (small, medium and large), as well as a detailed figure specific for small companies (10-49 employees). For retailers, these figures are respectively 4.5% and 2.4%.[269]

However, as the above database does not contain data on micro companies (with less than 10 employees) and this category of companies is notably the overwhelming majority of retailers[270], the following assumption has to be used. It is assumed that the ratio among micro and small retailers exporting through e-commerce is proportional to the ratio of all exporting micro and small firms (7/13)[271]. As the figure for small retailers exporting through e-commerce is available (2.4%), the one for micro firms is assumed to be 1.3% (= 2.4% x 7/13). The figure for micro firms and the one for the rest of the companies are weighted by the total number of firms in the respective categories, and the result is that 1.46%[272] of all retailers export through e-commerce, as it can be seen from table 7.

Table 7: Contract law related IT costs in B2C transactions

IT related costs in billion euro				Average number of countries exported to = 2.7 * transaction costs per firm = € 2916 * 82.4% of informed exporters	Average number of countries exported to = 5.1 * transaction costs per firm = € 2917 * 82.4% of informed exporters
Sector	**Firms**	**Percentages exporting through e-commerce**	**Exporters**	**Low estimate**	**High estimate**
Retail	4 605 233	1,46%	67 230	0.44	0.82

<u>For B2B transactions</u>

For B2B transactions it should be taken into account that in the case where an exporting company negotiates the applicability of its own law to the contract it may have no transaction costs at all. In this case, the company would not have to deal with a foreign law at all (as opposed to B2C transactions when a company still has to check the level of mandatory consumer protection provisions in the consumers' legislation even if it applies its own law). Therefore, it is assumed that in B2B trade transaction costs occur only when a company needs to apply a foreign law. EB 320, Q1 asks exporting companies "Which contract law most often governs your business-to-business cross-border transactions". 14.6% of the respondents said that most often they applied the national law of their business partner; 9% applied international legal instruments and 0.6% the law of a third country (0.6%). All these percentages are likely to be higher as 17% of the enterprises were not able (or did not want) to answer the related question.

268 Comprehensive databases, statistics on ENT 2009_2010 (NACE Rev 2), variable e_aeseu, %ent.

269 Comprehensive databases, statistics on ENT 2009_2010 (NACE Rev 2), variable e_aeseu, %ent.

270 4 364 674 out of 4 605 233, Eurostat Structural Business Statistics.

271 EB 196, 2007 Observatory of SMEs, p.45

272 [4.5% of e-commerce exporting retailers with more than 10 employees * 240 559 (number of retailers with more than 10 employees) + 1.3% of estimated e-commerce exporting micro retailers * 4 364 674 (number of micro retailers)] / 4 605 233 (total number of retailers) = 1.46% (percentage of total retailers exporting with e-commerce).

For the purpose of calculating the total transactions costs in B2B trade, based on a conservative assumption, only the companies applying the national law of their business partner are considered. The use of this figure also guarantees that all the costs that are considered are actually incurred, as companies had to become familiar with the foreign contract law. The costs for these companies are likely to grow proportionately to the number of EU countries they trade with.

The estimate is conservative as it does not take into account the companies which apply the law of a third country or international legal instruments, as it is assumed that they bear the transaction costs only once even if they trade with multiple countries. Furthermore, a number of exporting companies may not even have consulted a lawyer before they started exports. EB 320 found that 14.9% of companies currently involved in cross-border B2B transactions did not even know which contract law most often governs their transactions in the EU. However, this group of companies is excluded from the estimate based on the formula below:

*Transaction costs per company * number of exporting companies in B2B sectors (agriculture, manufacturing and mining, wholesale trade)* average number of EU countries exported to* 14.6% of cases when the national contract law of the business partner applies to the contract*

The number of exporters is estimated on the basis of a Eurostat database[273] using data of 2007. More up-to-date data is not available in the databases of Eurostat as of 2011. In order to calculate an estimate for the whole EU, the average share of exporters for each sector in these 18 countries is multiplied by the total number of enterprises in the EU-27 in each sector.

273 DS-056329-1: Trade by activity and enterprise size class, that provides the number of enterprises exporting intra-EU in 2007 in a sample of 18 Member States, divided by sector of activity (Czech Republic, Denmark, Germany, Estonia, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden). In this database, data on wholesalers and retailers are not available for Luxembourg (estimate based on 17 countries), and data on agriculture are not available for Italy and Luxembourg (estimate based on 16 countries).

Table 8: Cumulative transaction costs for the EU economy

Overall transaction costs (without IT related costs) in € billion

Sector	**Number of Firms**	**Percentages of exporting firms**	**Number of Exporters**	**Low estimate**[274]	**High estimate** [275]
Agriculture	13 700 400	0.21%	28 771	0.10	0.21
Manufacturing and Mining	2 344 213	15.50%	363 353	1.29	2.71
Wholesale	1 752 154	15.32%	268 430	0.95	2.00
Retail	4 605 233	4.01%	184 670	3.58	7.42
Total	**22 402 000**	**3.77%**	**845 224**	**5.92**	**12.34**

IT related costs in € billion

Sector	**Number of Firms**	**Percentages of exporting firms**	**Number of Exporters**	**Low estimate**[276]	**High estimate** [277]
Retail	4 605 233	1.46%	67 230	0.44	0.82
				Low estimate	**High estimate**
Total transaction costs in € billion				**6.36**	**13.16**
Annual costs in € billion [278]				**0.93**	**1.92**

Considering the agricultural sector, where the number of companies is higher than in all other sectors combined, the percentage of European firms exporting drops to 3.77%. If the agricultural sector is excluded from the estimate, the figure rises to 9.3%.

- **Annual transaction costs for the EU economy**

Annual costs are based on the estimate that 14.6% of exporters enter cross-border trade in the EU every year.[279] This is computed comparing the figures in Table 7 (2007) with the equivalent ones for 2006 obtained from the same database. Both the total number of firms and the percentages of firms exporting are lower in 2006. The results are shown in Table 9.

274 For B2B (agriculture, manufacturing and mining and wholesale) the costs are calculated using the lower value of €9,000 per company * 14.6% of companies applying a foreign law * 2.7 Member States companies export to * number of exporters; For B2C (retail) the costs are calculated using the lower value of €8,695 * 82.4% of informed exporting companies * 2.7 Member States companies export to * number of exporters

275 For B2B (agriculture, manufacturing and mining and wholesale) the costs are calculated using the higher value of €10,658 per company * 14.6% of companies applying a foreign law * 4.8 Member States companies export to * number of exporters; For B2C (retail) the costs are calculated using the lower value of €9,565 * 82.4% of informed exporting companies * 5.1 Member States companies export to * number of exporters

276 Average number of countries exported to = 2.7 * transaction costs per firm = € 2 916 * 82.4% of informed exporting companies * number of exporters in e-commerce

277 Average number of countries exported to = 5.1 * transaction costs per firm = € 2 917 * 82.4% of informed exporting companies * number of exporters in e-commerce

278 See Table 9, Table 10 and related explanation.

279 Eurostat database DS-056329-1: Trade by activity and enterprise size class. Comparable data are only available for the period 2006-2007. Eurostat also contains statistics for the period of 2004-2005, but since a different methodology was used for collecting the data, the figures contain large discrepancies and are not comparable with the period 2006/2007.

Table 9 – Number of exporting firms (2006-2007) and growth

	2006	2007
Manufacturing	333 927	360 039
Wholesale	239 439	268 430
Retail	139 154	184 670
Total	**712 520**	**813 139**
Annual increase in number of exporting firms 2006-2007	14.59%	

This figure does not take into consideration the fact that some of the new exporters may have already exported in the past and previously incurred the one-off transaction costs. However, this may be balanced by the fact that this estimate does not include companies which already export and want to expand their operations to more EU countries. Therefore, we consider that new exporters explore on average the same number of foreign markets (between 2.7 and 5.1 Member States) as exporters that are not new. Hence, in order to estimate the annual transaction costs, a growth rate of 14.59% in the number of companies is assumed in each sector. Table 10 shows the estimate of the total annual transaction costs. The low and high estimates are computed as above.

Table 10: Annual transaction costs for the EU economy

Annual transaction costs (without IT related costs) in € billion

Sector	Number of exporters (2007)	Number of new exporters every year[280]	Low estimate[281]	High estimate[282]
B2B[283]	660 554	96 375	0.34	0.72
B2C[284]	184 670	26 943	0.52	1.08
Total	**845 224**	**123 318**	**0.86**	**1.80**

IT related costs in € billion

Sector	Number of exporters (2007)	Number of new exporters every year[285]	Low estimate[286]	High estimate[287]
B2C[288]	67 230	9 809	0.07	0.12

	Low estimate	High estimate
Annual costs in € billion	**0.93**	**1.92**

€1 to €2 billion is therefore the estimate for the incurred one-off cost for new exporters every year.

280 14,59% of number of exporters in 2007.

281 For B2B (agriculture, manufacturing and mining and wholesale) the costs are calculated using the lower value of €9,000 per company * 14.6% of companies applying a foreign law * 2.7 Member States companies export to * number of exporters; For B2C (retail) the costs are calculated using the lower value of €8,695 * 82.4% of informed exporting companies * 2.7 Member States companies export to * number of exporters

282 For B2B (agriculture, manufacturing and mining and wholesale) the costs are calculated using the higher value of €10,658 per company * 14.6% of companies applying a foreign law * 4.8 Member States companies export to * number of exporters; For B2C (retail) the costs are calculated using the lower value of €9,565 * 82.4% of informed exporting companies *5.1 Member States companies export to * number of exporters

283 Agriculture, Manufacturing and Mining, Wholesale.

284 Retail.

285 14,59% of number of exporters in 2007.

286 Average number of countries exported to = 2.7 * 82.4% of informed exporting companies * transaction costs per firm = €2,916 * number of exporters in e-commerce

287 Average number of countries exported to = 5.1 * 82.4% of informed exporting companies * transaction costs per firm = €2,917 * number of exporters in e-commerce

288 Retail.

5. Implementation costs for options 4, 5a and 6

The implementation of the different policy options would generate costs, which depending on the option, would affect either exporting companies only, or all companies (including those who only trade domestically).

Option 4 (optional Common European Sales Law)

The one-off implementation costs would affect only those exporting companies, who decide to choose the optional Common European Sales Law. Under option 4, only a certain percentage of exporters would use it. The assumption is that realistically at the first stage 25% up to 50% of new exporters would be willing to choose the optional Common European Sales Law. Thus, the aggregate implementation costs for the EU economy can be calculated based on the formula below:

*% using optional Common European Sales Law * number of exporting companies * implementation costs per company*

Assuming that 25% use the OI, and using the transaction costs per company estimated in section 2 of this Annex, the implementation costs would be:

B2C (low estimate): 25% 184 670 * €8,695 = €0.4 bn*
+
*B2B (low estimate): 25% * 660 554 * €9,000 = € 1.49 bn*
= €1.89 bn

Option 5a (Full harmonisation Directive) / Option 6 (Regulation establishing a mandatory Common European Sales Law)

The one-off implementation costs under options 5a and 6 would affect both exporting companies and those who trade only in their domestic market, as the respective instrument would be binding for all companies. The aggregate implementation costs for the EU economy can be calculated based on the formula below:

*Companies that trade only domestically (17 136 213 in B2B and 4 420 563 in B2C) * implementation costs per company = €208.8 bn*
+
*companies that export * implementations costs per company = €8.18 bn*
= ***€ 216.98 bn***

6. Savings for the EU economy

6.1. Savings for new exporters

The savings for new exporters would arise annually, as a consequence of the reduction in transaction costs for cross-border trade as a result of a Common European Sales Law instrument.

Option 4 (optional Common European Sales Law)

Exporters will benefit from savings when they export to more than 1 Member State. The companies using the optional Common European Sales Law will only incur the cost of familiarising themselves with the new law.

If the current export level persists (on average about 2.7 – 5[289] MS), the cost savings could be estimated as follows:

Annual transaction costs under baseline scenario – annual transaction costs under the optional Common European Sales Law = Savings under the optional Common European Sales Law

Therefore, under different assumptions for the percentage of companies who would use the optional Common European Sales Law, the savings can be calculated as:

*(100% -% using the optional Common European Sales Law) * annual transaction costs under baseline scenario + % using the optional Common European Sales Law * (annual transaction costs under baseline scenario / average number of countries they export to) = annual transaction costs under the optional Common European Sales Law.*

For instance, assuming that 25% of the new exporters will use the optional Common European Sales Law:

- The annual costs would be:

Low estimate: 75% * €1 bn + 25% *€1bn / 2.7 MS = € 0.85 bn
High estimate: 75% * €2bn + 25%* €2 bn / 5 MS = €1.6 bn

- The annual savings would be:

Low estimate: €1bn – €0.85 bn = **€ 0.15 bn**
High estimate: €2 bn – € 1.6 bn **= €0.4 bn**

The more companies that use the optional Common European Sales Law, the higher the savings will be.

In a longer term, these annual savings could be discounted[290] to €3.9-€10bn and the net benefit for the EU economy would be €2-€8.11bn (€3.9-€10bn minus €1.89bn).

Option 5a (Full harmonisation Directive) / Option 6 (Regulation establishing a mandatory Common European Sales Law)

The savings for new exporters under option 5a would amount to **€0.63 – €1.6 bn** (computed under the formula used for option 4).[291]

However, this estimate is simplified and does not consider that, particularly in B2B transactions, companies would continue to benefit from the freedom of choice of law under international private law rules. The percentage of companies that would have a preference for international law instruments or laws of third countries in a scenario where a Directive was put in place is difficult to determine. It would partially depend on the content of the Directive and whether companies would see it as a more beneficial choice compared to other alternatives. In any case, the Vienna Convention would continue to apply on an opt-out basis and would therefore govern the transactions where no choice of law was exercised. Furthermore, companies which would have specific preferences for the law of third countries, such as Swiss law, could continue to exercise this choice.

These savings would however not outweigh the initial one-off adaptation cost of €216.98 bn even in the longer time frame.[292]

289 4.8 in B2B and 5.1 in B2C

290 Discount rate of 4% as recommended in the European Commission IA Guidelines, Annex XI.

291 It is important to note that these savings only represent a situation under which the new exporters trade with the same number of MS as under the BS.

292 In a longer term, these annual savings could be discounted to €15.75 - €40 bn and the net loss for the EU economy would be (- €201.23) – (- €176.98) bn (i.e. €15.75 - €40 bn minus €216.98 bn).

6.2. Potential savings for current exporters

Current exporters that would expand their cross-border sales to new countries would also benefit as they would incur only a one-off adaptation cost in order to begin trade to a new EU country.

It is assumed that 25% of the companies would use the optional Common European Sales Law (46,168 companies).[293] The expected increase in number of new countries the companies would trade with if the Common European Sales Law was available is based on the results of EB 321.[294]

The potential avoided transaction costs for the EU economy are illustrated in the table below. The table takes as a basis the low estimate of transaction costs i.e. €8,695 for each new MS into which a company exports.

Table 11: Savings for the EU economy, B2C

Companies	Would trade to			
Currently trading to	1-2 new countries (=1.5)	3-5 new countries (=4)	6 or more new countries (=6)	
1 country	40%	31%	8%	PERCENTAGES
2-3 countries	31%	33%	17%	
4 or more	17%	35%	27%	
1 country	4 723	3 660	945	COMPANIES[295]
2-3 countries	4 994	5 316	2 738	
4 or more	3 103	6 388	4 928	
1 country	20 533 394	95 480 283	41 066 788	SAVINGS (€)
2-3 countries	21 710 238	138 665 390	119 056 143	
4 or more	13 488 938	166 628 061	214 236 078	

Total savings (low estimate)	**830 865 313**

The table is divided into three horizontal parts. The first part (percentages) shows the share of exporters (currently trading to 1, 2-3, or "4 or more" countries) that declared they would expand their cross-border sales.

The second part of the table (companies) shows the absolute number of current exporters that would expand their cross –border to a certain number of new countries (1-2, 3-5, "6 or more").

For example, 40% of current exporters trading with 1 country i.e. 4,723 companies, would expand their cross-border sales to 1-2 new countries.

In order to estimate the potential savings (third part of the table), the number of companies are multiplied by the number of additional MS these companies would export to and by the cost per MS that they avoid when using the Common European Sales Law.[296]

293 According to EB320 and EB321 40% of companies in B2C and 34% in B2B would increase their cross-border operations if they were able to choose a single Common European Sales Law for transactions. These figures give an indication on the number of companies that expect their cross-border trade to expand under option 4. However, as the sample of the EB surveys covered also non-exporters that are interested in cross-border trade, the more conservative estimate of 25% of exporters using the optional Common European Sales Law is used.

294 EB 321, p.36.

295 Data on number of current exporters and their level of cross–border trade a taken from Table 6 of this Annex.

Under the low estimate, total savings amount to €0.8 bn. If the high estimate of transaction costs i.e. €9,565 (per company per MS) is used, total savings would amount to around €0.9 bn.

For B2B transactions, it has been assumed that 25% of the companies would use the OI (165,139 companies)[297].
The expected increase in number of new countries the companies would trade to if the Common European Sales Law was available is based on the results of EB 320. [298]
The potential avoided transaction costs for the EU economy are illustrated in the table below. The table takes as a basis the low estimate of transaction costs i.e. €9,000 for each new MS into which a company exports.
The calculations are developed similarly as described for the previous table.

Table 12: Savings for the EU economy, B2B

Companies	Would trade to			
Currently trading to	1-2 new countries (=1.5)	3-5 new countries (=4)	6 or more new countries (=6)	
1 country	54%	27%	5%	PERCENTAGES
2-3 countries	31%	37%	14%	
4 or more	24%	37%	21%	
1 country	23 040	11 520	2 133	COMPANIES[299]
2-3 countries	19 560	23 346	8 834	
4 or more	14 250	21 968	12 468	
1 country	103 681 360	311 044 081	96 001 260	SAVINGS (€)
2-3 countries	88 022 001	630 351 105	397 518 715	
4 or more	64 122 910	593 136 917	561 075 462	
Total savings (low-estimate)	**2 844 953 811**			

Under the low estimate, total savings amount to €2.84 bn. If the high estimate of transaction costs i.e. €10,658 (per company per MS) is used, total savings would amount to around €3.4 bn.

The total savings for the EU economy for B2B and B2C transactions considering the extra number of MS in which companies would trade under an OI would be **€3.7 – €4.3 bn**.

The total savings under **option 5a** (full harmonisation Directive) would be at least of the same scale as option 4, as the level of exports is likely to increase similarly to the scenario under option 4. However, it is difficult to estimate the precise scale of the increase and the law which would govern those transactions in particular in B2B trade. It is not certain what percentage of businesses would choose, as their preferred choice, the national law after the implementation of the Directive under option 5a. Companies would continue to benefit from the freedom of choice of law under international private law rules. Thus, their preference for the Directive would partially depend on its

296 e.g. for companies currently trading to 1 country that would trade to 6 or more new countries, the savings would be 6*€8,695 – €8,695 of implementation = €43,475, multiplied by 945 companies = €41 million.

297 According to EB320 and EB321 40% of companies in B2C and 34% in B2B would increase their cross-border operations if they were able to choose a single Common European Sales Law for transactions. These figures give an indication on the number of companies that expect their cross-border trade to expand under option 4. However, as the sample of the EB surveys covered also non-exporters that are interested in cross-border trade, a more conservative estimate of 25% of exporters using the optional Common European Sales Law has been taken forward.

298 EB 320, p. 34

299 The number companies currently trading with 1 to "4 or more" MS comes from Table 5 of this Annex.

content, compared to other alternatives. In any case, the Vienna Convention would continue to apply on an opt-out basis and would govern transactions where no choice of law was exercised. Another alternative to the Directive would be the law of third countries, such as Swiss law. As B2B trade accounts for the larger share of aggregate transaction costs, it would also largely determine potential costs savings.

ANNEX IV: ECONOMIC MODEL APPLIED TO THE ASSESSMENT OF POLICY OPTIONS

1. The Global Trade Analysis Project (GTAP)

The macro-economic analysis has been carried out using the Global Trade Analysis Project (GTAP) model.[300] GTAP is a static general equilibrium model analysing changes in production, trade and consumption as a consequence of changes in such exogenous variables as costs.[301] The model includes all countries in the EU27 and 57 products among which 24 are manufactured goods. GTAP is able to calculate the impact of a new policy on GDP, trade, intra-EU trade, consumer prices and expenditure and consumer welfare.

For each country, GTAP identifies demand for the 57 products by households (consumers), businesses and governments. For each type of customer, product demand is split into demand for domestic products and demand for imported products. For each country, product supply depends on the use of domestic and imported products and domestic production factors such as capital, land, labour and natural resources.

The model identifies prices at different levels of the supply chain from the production costs to the customer prices i.e. producer prices, market prices, export prices, import prices, consumer prices. Prices diverge due to taxes and subsidies, transport costs and wholesale and retail margins.

The labour market is assumed not to be in equilibrium. Wages are fixed and employment grows with demand and production.

Data is collected and processed by a consortium of 27 agency members including the European Commission, FAO, OECD, World Bank, three US agencies and WTO.

2. Assumptions for impact calculation

The Flash Eurobarometer surveys 320 and 321[302] provide data on the attitudes of companies trading and interested in cross-border trade, among others on their willingness to use the European contract law and impacts it could have on the level of their cross-border trade. More specifically, the companies were asked to indicate whether they would use the European contract law if it was made available and whether they would expand their trade to more Member States.

The respondents were asked to provide a qualitative assessment of the impact the European contract law would have on their cross-border sales i.e. to indicate whether their cross border sales would increase a lot, a little or decrease. Therefore, assumptions had to be made on the numerical value of these qualitative answers. The following assumptions have been made:

- "small decrease/increase in trade": the assumed value for "small" is within the range of 1%-4% where 1% is the low, 2% is the medium and 4% is the high estimate. Under the low estimate it is assumed that the cross-border operations of a company would increase/decrease by 1% and under the high estimate by 4%.
- if a respondent indicated that he expected a "large increase", the assumed value for "large" is within the range of 5%-20%, where 5% is the low, 10% the medium and 20% the high estimate. Under the low estimate it is assumed that the cross-border operations of a company would increase/decrease by 5% and under the high estimate by 20%.

300 See www.gtap.agecon,purdue.edu and Hertel et al. (1997), Global trade analysis; Modelling and applications, Cambridge University Press.

301 The model has an Input-Output structure for all the economies included. Trade is identified at the bilateral level.

302 Flash Eurobarometer 321, European contract law in consumer transactions and Flash Eurobarometer 320, European contract law in business-to- business transactions

The above assumptions underlie the estimates of impacts of each option.

Options 5 and 6 would apply to all Member States and all traders and therefore have the most significant impact. The impact of option 4 would only be a fraction of the impact of option 5 and 6, as only a part of companies would choose the new optional Common European Sales Law. The impact of option 3 is likely to be much more limited than the one of option 4, as not only the companies, but also the Member States will have the possibility to choose if they want to apply the optional Common European Sales Law and in which form.

Assumed impact of policy option 5 and 6

Based on the above assumptions, the impact on trade could be estimated at 0.8%-3.1% for B2B transactions and 0.9%-3.5% for B2C transactions. Option 5 and 6 are likely to increase cross-border trade by 0,8% in B2B and 0,9% in B2C under the low estimate and up to 3,1% in B2B and 3,5% in B2C under the high estimate.

Table 1 – Assumed impact on trade[303]

B2B transactions: EB 320, question 5 **If companies were able to choose one single European contract law for their B2B cross-border transactions in the EU, would their cross-border operations…**				
Impact expected	Share of firms indicating expected impact on cross-border trade	Assumptions		
		Low estimate	Medium estimate	High estimate
Decrease	1,20%	-1%	-2%	-4%
Remain the same	54,30%	0%	0%	0%
Increase a little	24,60%	1%	2%	4%
increase a lot	8,90%	5%	10%	20%
Don't know	11,00%			
Impact on trade Weighted average		0.76%	1.53%	3.05%
B2C transactions: EB 321, question 6: **If companies were able to choose one single European contract law in all transactions with consumers from other EU countries, would their cross-border operations…**				
Impact expected	Share of firms indicating expected impact on cross-border trade	Assumptions		
		Low estimate	Medium estimate	High estimate
Decrease	0,60%	-1%	-2%	-4%
Remain the same	48,70%	0%	0%	0%
Increase a little	30,10%	1%	2%	4%
increase a lot	9,50%	5%	10%	20%
Don't know	11,00%			
Impact on trade Weighted average		0.87%	1.73%	3.46%

The price elasticity of import demand is a measure of how the volume of cross-border trade reacts to a change in prices i.e. it shows how the demand decreases as the result of a one percentage increase in price. The value of price elasticity of import demand is equal to -2.8%.[304]

303 In all MS for options 5 and 6. For option 4, these impacts are proportionally reduced according to the fraction of companies using the optional Common European Sales Law. Option 3 has the same characteristic and the trade increases only in MS incorporating the Recommendation.

304 GTAP model

As indicated above, the impact of policy options 5 and 6 is an increase in trade of 0,76% (low estimate) to 3,05% (high estimate). In order to achieve this level of the trade growth, import prices would need to fall by 0.27% under the low estimate, 0,55% under the medium estimate and 1,23% under the high estimate.[305]
These values have been used to compute economic impacts in the GTAP model.[306]
In order to have the desired change in trade, import prices (and not trade itself) are manually adjusted at the right level in the model.

Assumed impact of policy option 4

In case of option 4 all Member States will have to implement the optional Common European Sales Law in their national law. Therefore, assumptions need to be made only for the number of companies who would be willing to use it.

The most optimistic assumption is that 70% of exporting companies in all Member States would use the optional Common European Sales Law. It is based on the responses to EB 320 (on B2B transactions) and EB 321(on B2C transactions) in which respectively 70% and 71% of the respondents indicated that they were likely or very likely to use a single European contract law in cross-border transactions.

However, considering that only a fraction of these respondents indicated an optional instrument as the preferred option, respectively 38% EB 320 (on B2B) and 37% in EB 321 (for B2C), more conservative assumptions could be that 50% or 25% of the exporters use the optional Common European Sales Law. These conservative assumptions have been taken forward in the analysis below.[307]

Assumed impact of policy option 3

The assumptions on the take-up of an optional Common European Sales Law by companies used for option 4 also apply for option 3. In addition, for option 3 a further assumption on the number of Member States who would incorporate the Commission Recommendation introducing an optional Common European Sales Law needs to be made.

It is likely that not all Member States would incorporate the Commission Recommendation. It is however assumed that the Recommendation could be followed by large and small, old and new Member States located in different parts of the EU, at a different level of economic development. Based on this criterion a representative selection of EU countries is made. It includes Denmark, Lithuania, Germany, Netherlands, Hungary, Poland, Portugal, Italy, Romania and the UK.

For an estimate of the most positive impacts possible, it is assumed that the countries incorporating the Recommendation do this entirely and without changes. The willingness to expand trade is the same as under option 4, at least for the countries incorporating the Recommendation. It seems likely that an instrument available only in a number of countries would be less attractive to companies than an instrument available in the whole of the EU. Therefore the low assumption on the number of companies using the optional Common European Sales Law i.e. 25% is used for the estimates of impacts of policy option 3.

305 0.76% divided by -2.8%, 1.53% divided by -2.8% and 3.46% divided by -2.8%.

306 In order to have the desired change in trade, import prices (and not trade itself) are manually adjusted at the right level in the model.

307 For the impact on administrative costs the assumption of 70% of exporters using the optional Common European Sales Law was considered in order to show the maximum magnitude of costs.

In fact, businesses in countries not incorporating the Recommendation could still use the new instrument when trading into a country having implemented it (B2C transactions). In B2B transactions when the Recommendation is incorporated by at least one Member State, companies also from other Member States could choose the incorporated law as applicable law. The economic impact of this on countries not applying the Recommendation is shown in the column "Impact on other Member States" in the tables below and applies only to option 3.

3. Estimates of specific impacts

Following the requirements of the Commission Impact Assessment Guidelines only the most significant impacts have been quantified.

The following tables are generated through the application of GTAP based on the assumptions made in section 2.

3.1. Impact of policy options on export

As import prices fall[308] there would be a shift in demand from domestic supply to import supply (imported products become more attractive in terms of their prices). At the same time, businesses would shift supply from domestic customers to foreign customers i.e. businesses have more foreign customers.

As import prices fall, domestic prices would be under pressure as well. As a result, aggregate demand would go up as a consequence of which production would go up. The price decrease would benefit both domestic and import supply.

Table 2 - Impact on exports by EU Countries: intra- and extra-EU trade (€ millions)

	Option	Companies participating	Impact on countries participating	Impact on other Member States	Total
Low estimate	Option 3	25% Companies	2,100	298	2,398
	Option 4	25% Companies	4,915		4,915
		50% Companies	9,831		9,831
	Options 5 & 6		19,662		19,662
Medium estimate	Option 3	25% Companies	4,115	580	4,695
	Option 4	25% Companies	9,585	-	9,585
		50% Companies	19,070	-	19,070
	Options 5 & 6		38,341	-	38,341
High estimate	Option 3	25% Companies	8,397	1,190	9,587
	Option 4	25% Companies	19,498	-	19,498
		50% Companies	38,996	-	38,996
	Options 5 & 6		77,993		77,993

With option 4, exports increase by approximately €5-€19 billion.

308 This variable does not depend from other ones and it is set manually in the model, based on the assumptions described above.

3.2. Impacts on consumers

3.2.1. Impact on consumer prices

The decrease in import prices would lead to a decrease of consumer prices. For instance, a decrease in import prices by 0.27% under the low estimate (see section 2) under options 5 and 6 leads to a decrease in consumer prices by 0.14% (see table 4). This is lower, because import prices are only a fraction of consumer prices and because prices of domestically supplied products would decrease less.

Under option 3, consumer prices would decrease by 0.03% under the low estimate (if 10 countries[309] incorporated the Recommendation and 25% of companies used the instrument).

Consumers would consume more imported goods as they become relatively cheaper. In the low estimate, consumption of imported goods would go up by 0.8% under options 5 and 6 and 0.2-0.4% under option 3 and option 4 (see table 3).

Table 3 - Impact on consumer price and consumption of imported household goods (% changes)

	Option	Companies participating	Consumer price		Consumption of imported goods	
			Participating countries	Other countries	Participating countries	Other countries
Low estimate	Option 3	25% Companies	-0.033	-0.002	0.181	0.026
	Option 4	25% Companies	-0.035	-	0.208	-
		50% Companies	-0.070	-	0.415	-
	Options 5 & 6		-0.140	-	0.830	-
Medium estimate	Option 3	25% Companies	-0.064	-0.003	0.355	0.05
	Option 4	25% Companies	-0.070	-	0.410	-
		50% Companies	-0.140	-	0.820	-
	Options 5 & 6		-0.280	-	1.640	-
High estimate	Option 3	25% Companies	-0.131	-0.006	0.724	0.103
	Option 4	25% Companies	-0.143	-	0.835	-

309 See country selection in section 2.

		50% Companies	-0.285	-	1.670	-
	Options 5 & 6		-0.570	-	3.340	-

3.2.2. Impact on consumer welfare

The decrease in consumer prices increases consumer welfare. Consumers would get the same value at lower prices. This would increase consumer surplus, i.e. the difference between the price the consumers are willing to pay and the amount they actually pay. Under the low estimate consumers would have a surplus of €18 billion if a full harmonisation Directive (option 5) or Regulation establishing a mandatory Common European Sales Law (option 6) was adopted. A percentage of this value would measure the surplus for consumers under option 4: if 25% companies use the optional Common European Sales Law, consumers will enjoy an extra €4.5 billion. Option 3 with the same percentage of companies using the optional Common European Sales Law, will give a consumer surplus of €1.5 billion.

Table 4 - Impact on consumer welfare (€ millions)

	Option	Companies participating	Impact on countries Participating	Impact on other Member States	Total
Low estimate	Option 3	25% Companies	1,483	449	1,932
	Option 4	25% Companies	4,575	-	4,575
		50% Companies	9,150	-	9,150
	Option 5		18,300	-	18,300
Medium estimate	Option 3	25% Companies	2,911	882	3,793
	Option 4	25% Companies	8,980	-	8,980
		50% Companies	17,961	-	17,961
	Option 5		35,922	-	35,922
High estimate	Option 3	25% Companies	5,392	1,797	7,729
	Option 4	25% Companies	18,300	-	18,300
		50% Companies	36,599	-	36,599
	Option 5		73,199	-	73,199

3.3. Macro-economic impacts

3.3.1. Impacts on GDP

GDP grows because of changes in consumption ΔC, investment ΔI, government spending ΔG, exports ΔX and imports ΔM.

The change in GDP equals

$$\Delta GDP = \Delta C + \Delta I + \Delta G + \Delta X - \Delta M$$

All these variables have been computed in the GTAP model based on the assumptions in section 2.

Table 5 - Impact on GDP (€ millions)

	Option	Companies participating	Impact on countries participating	Impact on other Member States	Total
Low estimate	Option 3	25% Companies	1,817	363	2,180
	Option 4	25% Companies	5,008	-	5,008
		50% Companies	10,017	-	10,017
	Option 5		20,034	-	20,034
Medium estimate	Option 3	25% Companies	3,567	712	4,279
	Option 4	25% Companies	10,017	-	10,017
		50% Companies	20,034	-	20,034
	Option 5		40,069	-	40,069
High estimate	Option 3	25% Companies	7,268	1,451	8,720
	Option 4	25% Companies	20,329	-	20,329
		50% Companies	40,658	-	40,658
	Option 5		81,316	-	81,316

For instance, for option 4, under the low estimate, the GDP grows by € 5-10 billion and under the high estimate grows by €20- €40 billion.

3.3.2. Impacts on Employment

Table 6 - Impact on employment (persons)

	Option	Companies participating	Impact on countries Participating	Impact on other Member States	Total
Low estimate	Option 3	25% Companies	63,667	10,083	73,751
	Option 4	25% Companies	159,300	-	159,300
		50% Companies	318,600	-	318,600
	Option 5		637,200	-	637,200
Medium estimate	Option 3	25% Companies	124,977	19,793	144,770
	Option 4	25% Companies	315,900	-	315,900
		50% Companies	631,800	-	631,800
	Option 5		1,263,600	-	1,263,600
High estimate	Option 3	25% Companies	254,670	40,332	295,002
	Option 4	25% Companies	637,200	-	637,200
		50% Companies	1,274,400	-	1,274,400
	Option 5		2,548,800	-	2,548,800

For instance, for option 4, under the low estimate, there would be approximately 160 000 – 320 000 new jobs.

ANNEX V: DETAILED ANALYSIS[310] OF IMPACTS OF POLICY OPTIONS[311]

1. Policy option 1: Baseline Scenario

ECONOMIC IMPACTS

Transaction costs: The baseline scenario (BS) transaction costs[312] (one off) for trading with one other Member State (MS) amount to: in B2C transactions: on average €9,100 (€8,695- €9,565, plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs) and in B2B transactions €9,800 (€9,000-€10,658).

The overall transaction costs stemming from contract law for EU business currently involved in B2C and B2B transactions range between €7 billion and €15 billion.[313] These figures represent sunk costs that are not recoverable. But, in addition to these sunk costs we can compute an annual cost for the EU economy as new traders enter the market.

This cost can be estimated based on the percentage of new exporters within the EU on a yearly basis, (estimated at 14.6%).[314] Using this estimate, the annual aggregate transaction costs are approximately €1-2 billion. This is the maximum incurred annual cost due to the differences in contract law. If we assume these costs continued, by the year 2020, exporting firms would face transaction costs of €9-18 billion due to differences in contract laws.

For a micro enterprise in the retail sector the cost of trading in one additional MS amounts to 6.5% of its average annual turnover and for trading in the whole of the EU exceeds its average annual turnover by almost twice. For a small enterprise in the same sector the cost of trading in one additional MS would amount 0.25% of its annual turnover. For trading in the whole of the EU this would be 6.4% of its annual turnover. If a medium enterprise wished to trade with the whole of the EU it would have to invest 2.22% of its annual turnover, for a large enterprise it would cost 0.06% of its annual turnover. (see problem definition for calculation of costs and more detail).

Administrative costs (included in the overall figure of transaction costs): To trade in another MS, companies need to familiarise themselves with foreign law, adapt their terms and conditions and meet requirements (such as information provision to potential customers) set out in the law of this MS.

With no EU action, the average administrative costs[315] per company per MS with which it trades would amount to: in B2C €2,500, in B2B €1,500. These are mostly one-off costs but accumulate as the number of MS a company trades with increases. For example, for trade with 2 MS these figures would be €3,000 for B2B and €5,000 for B2C and for 5 MS it would be €7,500 for B2B and €12,500 for B2C.[316]

Opportunity costs of foregone trade: As set out in the problem definition, the transaction costs in some cases deter some businesses from trading, and in others limit their trade. Businesses

310 The economic impacts in this section have been calculated using the Global Trade Analysis Project (GTAP) model. (See www.gtap.agecon,purdue.edu and Hertel et al. (1997), Global trade analysis; Modelling and applications, Cambridge University Press.) GTAP is a static general equilibrium model analysing changes in production, trade and consumption as a consequence of changes in such exogenous variables as costs. The model has an Input-Output structure for all the economies included. Trade is identified at the bilateral level. The model includes all countries in the EU27 and 57 products among which 24 are manufactured goods. GTAP is able to calculate the impact of a new policy on GDP, trade, employment, intra-EU trade, consumer prices, expenditure and consumer welfare.

311 Unless otherwise stated the analysis in this section applies to both B2B and B2C transactions in a cross border only context. In addition, unless otherwise stated, all data in this section comes from EB 320 and 321. (EB surveys 320 and 321 provide data on the attitudes of export oriented companies, in particular, on their willingness to use the European contract law and the impacts it could have on the level of their cross-border trade. More specifically, the respondents indicated to what extent they would use European contract law if it was made available and whether they would expand their trade to more Member States. The impacts on all considered macro-economic variables are computed based on the companies' expectations for cross-border expansion of their trade if European contract law existed.)

312 See Annex III.

313 See Annex III.

314 See Annex III.

315 See Annex VII. Per company per MS for B2C this would be €2,500 and for B2B €1,500.

316 See Annex VII for more details on how these costs are calculated.

therefore miss out on potential trade. The costs for these missed opportunities are €26 billion–€184 billion for sales not made (B2B and B2C).
Competition in internal market and impact on consumer prices: With no EU action, competition in the internal market would remain limited. Due to the remaining legal differences and related costs, many businesses would not be encouraged to trade cross-border. Without this extra trade taking place, a number of businesses would not act competitively, which if they were to, would drive down prices.[317] As a result without an increase in competition in the market place, consumers would continue to face a restricted choice of products at a higher price
Impact on consumer protection: This option includes the adoption of the CRD which, due to its nature (a large element of full harmonisation) ensures that within its scope, consumers have rights which are harmonised across the EU. Therefore divergences between the consumer protection rules of different MS remain. Many Green Paper respondents stated that action should only be taken if a previously adopted instrument has proven to be inefficient.[318] However the text adopted does not harmonise important areas of consumer contract law, for instance sales remedies and unfair contract terms would remain fragmented across the EU. In addition, the CRD does not cover the full life cycle of a contract or B2B contracts. Therefore differences between the consumer protection rules of different MS remain. Not to take EU action would allow these differences to continue.

Impact on SMEs: For those performing B2B contracts, where parties are of a similar size, negotiating the applicable law is a time consuming factor which could otherwise be spent in the business. In the SME Panel Survey, 55% of SMEs responded that the negotiation of applicable law was an important obstacle to cross border trade.
In addition, it is normally the stronger (usually larger) party which imposes their country's law on the smaller party[319] as the law applicable to the contract. The smaller party then has to bear the transaction costs of finding out about the foreign contract law which applies to their contract. If the SMEs concerned in both scenarios are micro or small enterprises, then these costs would weigh, in relative terms, more heavily upon them.

Impact on law firms: No impact.

Public authorities: MS: No impact.
Judiciary: Litigation costs would result from the need for courts to investigate and apply different national laws than their own which are relevant for cross-border contracts would remain. Judges would either need to investigate the foreign applicable law themselves or obtain the necessary knowledge through the advice of legal experts or the evidence submitted by lawyers. In these instances, time of the judges and experts/lawyers would be taken to research the foreign applicable law. The cost of this time and research would be borne by either the courts or parties involved.

Analysis of provisions of instrument:[320] No impact.

SOCIAL IMPACTS

No impact.

ENVIRONMENTAL IMPACTS

Without EU action there would not be an increase in cross border trade and therefore no impact upon the environment (via for example an increase in delivery of goods which would increase CO2 and other emissions, or an increase of costs to control pollution due to the binding EU rules) would not be felt.

317 Thereby not contributing towards the Commission policy towards increasing competitiveness 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage', COM (2010) 614.

318 E.g. BEUC's response to the Green Paper consultation, p. 4; UEAPME's position on the EC Green Paper, p. 2; EuroCommerce's response to the EC consultation, p.1-2.

319 It is recognised that SMEs are not always in a weaker bargaining position; this example only applies to those who are.

320 This analysis is only applicable to those options which describe the impacts of a legal instrument.

ONLINE ENVIRONMENT With no EU action, the trend of domestic sales being far greater than cross border ones would continue.
OVERALL ASSESSMENT This option would not remove the additional transaction costs for cross-border trade identified in the problem definition. The subsequent opportunity costs would continue; the level of legal complexity for businesses wishing to trade cross border would not be reduced. This option would also mean that the complexity consumers experience regarding their rights in a cross-border context would remain and the practice of refusal to sell across border would not decrease. Even though this option takes account of full harmonisation of some consumer protection rules due to the adoption of the CRD, this harmonisation is restricted to only a few selected areas of consumer contract law. Most aspects of this law such as sales remedies and unfair contract terms would remain fragmented across the EU. This fragmentation would not give consumers the full confidence on all their consumer rights for when they purchase across border.

2. Policy option 2

2.1. Policy option 2a: Toolbox as a Commission document

The toolbox itself would only have an indirect impact upon businesses and consumers because concepts from the toolbox would be used for the development of future contract law legislation or the revision of existing EU legislation. The legislation itself would have the direct impact. As such a Commission instrument would not be agreed by the Council and EP, the EU legislator could always deviate from the parts on Commission proposals implementing the toolbox. Because of the uncertainty of its implementation, the impact of this option would not only be indirect but also very limited.[321] For this reason it is difficult to quantify what this impact would be. In addition, there would not be any immediate impact of this option upon businesses as negotiations for new legislation or an amendment to existing legislation would take time to achieve.

ECONOMIC IMPACTS Transaction costs: In the longer term this option could lead to a small reduction in the transaction costs due to the limited convergence of certain contract law concepts, but the extent of this is unknown as one cannot predict when and how these concepts would be used. Administrative costs (included in the overall figure of transaction costs): This option could create indirect administrative costs associated with future contract law requirements. For example if a future law based upon the toolbox obliged a trader to provide information not previously required, it could mean that the trader would have to bear the associated administrative costs. The use of the toolbox would have an indirect impact on these costs only as far as the concepts used from it impose an administrative burden on businesses in future legislation compared to the BS. These costs would depend on the potential future use of the toolbox. Competition in internal market and impact on consumer prices: There would be little changed from the BS. Impact on consumer protection: Where rules from the toolbox (which are not in the current acquis or domestic legislation) are adopted in EU legislation, they could raise the level of consumer protection in the laws of some MS. Having common rules in the toolbox, in the longer term could improve and harmonise to some extent the legal protection of consumers compared to the BS, however the impacts on consumer protection would only be felt if the EU legislator agrees to use the rules from the toolbox.

321 European Small Business Alliance response to the Green Paper, p2 also supports that the Toolbox does not have the substance 'to deliver real benefits to businesses engaged in transactions across the wider European market.'

Impact on SMEs: Very little change compared to the BS. Initially national contract laws would still apply and therefore so would the BS transaction costs. In the longer term there could be some limited convergence of Common European Sales Laws that could lead to a small reduction in transaction costs, however the extent of this is unknown.

Impact on law firms: No change from the BS.

Public authorities: MS: Very little change compared to the BS. An indirect impact felt only where new contract law concepts based on the toolbox would be included in future legislation and would need to be implemented/transposed by MS.
Judiciary: Very little change compared to the BS. A limited indirect impact could also be felt by the judiciary who, depending on the extent of the change, would need to train for new concepts in future legislation.

Analysis of provisions of instrument:[322] No impact.

SOCIAL IMPACTS

No change from the BS. With very little likely impact on facilitation of cross border trade, social impacts such as job creation would not occur.

ENVIRONMENTAL IMPACTS

No change from the BS. Without an increase in cross border trade there would not be an impact upon the environment (via for example an increase in delivery of goods which would increase CO2 and other emissions).

SIMPLIFICATION POTENTIAL

This option could create some convergence of the relevant contract law legislation and result in a small level of simplification as national laws would in time begin to develop similarities.

ONLINE ENVIRONMENT

No change from the BS as this impact would only be applicable to those options which describe a legal instrument.

OVERALL ASSESSMENT

Compared to the BS this option may to a very small extent help to facilitate the expansion of cross-border trade in the internal market. It may also to a small extent indirectly lead to an increased level of consumer protection in national contract laws.
However, since the contract law related transaction costs would largely remain unchanged, the positive impacts of this option on businesses and consumers would be minimal and in turn so would any subsequent impacts upon trade, competition and the internal market. Moreover, any impacts of this option would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time to achieve. Overall, as there is no way of knowing whether and how widely this option would be used and accepted by the Council and EP, the impacts of this option would not differ greatly compared to the BS and any impacts felt would be very small and would take place in the longer term.

2.2. Policy option 2b: Tool box as an inter-institutional agreement

As per policy option (PO) 2a, the toolbox itself would not have a direct impact upon businesses and consumers. As an inter-institutional agreement would bind the three EU institutions to make use of the toolbox concepts when drafting and negotiating legislative proposals related to contract law (except when overriding sector-specific reasons would lead to another result) there would be less

322 This analysis is only applicable to those options which describe the impacts of a legal instrument.

deviation from the use of the toolbox concepts compared to PO2a and more certainty in its implementation.

However, despite this increased certainty, the impacts of this option would remain indirect. For this reason it is difficult to quantify what these impacts would be. In addition, there would not be any immediate impacts of this option upon businesses as negotiations for agreeing new legislation or an amendment to existing legislation would take time to achieve.

ECONOMIC IMPACTS Transaction costs: In the longer term this option could lead to some reduction in transaction costs due to the convergence of certain contract law concepts. Although the extent of this use is unknown, there is a greater likelihood of this taking place as all three EU Institutions would agree on application of the toolbox concepts rather than just the Commission as would be the case in PO2a. Administrative costs (included in the overall figure of transaction costs): This option could create indirect administrative costs associated with future contract law requirements as set out under PO2a. Competition in internal market and impact on consumer prices: There would be little changed from the BS. Impact on consumer protection: Where rules from the toolbox are adopted in EU legislation, they could raise the level of consumer protection in the laws of some MS. The impact would be the same as set out under PO2a with one difference. As under this option there the toolbox concepts would be accepted by the Council and EP, the impacts would be felt to a greater extent than those felt under PO2a.
Impact on SMEs: Very little change compared to the BS. Initially national contract laws would still remain and therefore so would the baseline transaction costs. In the longer term there would be some limited convergence of Common European Sales Law that could lead to a small reduction in transaction costs, however the extent of this is unknown.
Impact on law firms: No change from the BS.
Public authorities: MS: Very little change compared to the BS. An indirect impact felt only where new contract law concepts based on the toolbox would be included in future legislation and need to be implemented by MS. Judiciary: Very little change compared to the BS. This limited indirect impact would also be felt by the judiciary who, depending on the extent of the change would need to train for new concepts in future legislation.
Analysis of provisions of instrument:[323] No impact.
SOCIAL IMPACTS No change from the BS. With very little likely impact on facilitation of cross border trade, social impacts such as job creation would not occur.
ENVIRONMENTAL IMPACTS No change from the BS. Without an increase in cross border trade there would not be an impact upon the environment (via for example an increase in delivery of goods which would increase CO_2 and other emissions).
SIMPLIFICATION POTENTIAL This policy option could create a greater convergence of the relevant contract law legislation than PO2a and result in a small level of simplification as national laws would in time begin to develop similarities to each other.

323 This analysis is only applicable to those options which describe the impacts of a legal instrument.

ONLINE ENVIRONMENT No change from the BS as this impact would only be applicable to those options which describe a legal instrument.
OVERALL ASSESSMENT As this option involves all three Institutions agreeing to make use of the toolbox, this option would, to a somewhat greater extent compared to PO2a, reduce the differences between national contract laws which would help to facilitate the expansion of cross-border trade in the internal market. This option could to a limited, but greater extent than PO2a indirectly lead to a higher level of consumer protection and legal certainty about consumer rights. However, since the toolbox would only be used for the amendment of existing or preparation of future sectoral legislation, contract law related costs stemming from differences of national contract laws would largely remain and in turn so would any subsequent impacts upon trade, competition and the internal market. Moreover, there would not be any immediate impacts of this option upon businesses and consumers as negotiations for new legislation or an amendment to existing legislation would take considerable time to achieve. As this option would only concern national contract law rules which are modified following revised or new EU legislation and would only have an impact at the earliest at a medium term, the overall positive impacts of this option would be, albeit greater than PO2a, still rather limited.

3. **Policy option 3:** Recommendation on a Common European Sales Law

This option would encourage MS to incorporate voluntarily into their domestic law a Common European Sales Law instrument as a 'second regime'. This second regime would not replace existing legal traditions, but sit alongside a relevant specific national regime. The rules of the Common European Sales Law could be voluntarily chosen by the parties as the law applicable to their cross-border contracts. Therefore businesses would have the choice to continue to use their national law in their cross border transactions or to use the Common European Sales Law.

| **ECONOMIC IMPACTS**
Transaction costs: The impacts of this option would very much be dependent upon:
• Whether and how many MS decide to incorporate a Common European Sales Law instrument as an optional regime and to what extent
• How many businesses decide to use the Common European Sales Law
On a qualitative basis the impacts would reduce transaction costs to some degree as for those MS who decide to incorporate the Common European Sales Law without any changes, the differences between national cross border laws would cease. There are several variants of the incorporation of the Common European Sales Law under this option and its subsequent outcomes:
Scenario 1: In the ideal scenario all MS would implement the Common European Sales Law completely without changes and at the same time. If this occurred then the impacts of this scenario would be the same as those listed under the analysis of impacts of policy option 4.
Scenario 2: If only some of the MS (for example 10), implemented the Common European Sales Law completely, without changes and at the same time a differentiation would be necessary for those traders performing a B2B contract and those performing a B2C contract. This scenario would be of benefit to traders who perform B2B contracts, because even where MS decide not to incorporate the Common European Sales Law, traders would have the freedom to decide on the law applicable to their contract. This would mean that traders who performed B2B contracts would have the opportunity to reduce their transaction costs through the use of the Common European Sales Law. This reasoning would also apply to B2C contracts but only for trade with consumers from those MS which implement the Common European Sales Law entirely and without changes. For |

those MS who do not do this, scenario 3 (below) would apply.

Scenario 3: Some MS could decide to incorporate the Common European Sales Law not completely, with changes, not at the same time, or a combination of these factors. For B2B contracts the same situation as scenario 2 would apply. For B2C contracts the situation would become even more complicated as under scenario 2. First, like under scenario 2 the Common European Sales Law could only be applied if the law of a MS which has incorporated the Recommendation would be applicable. However, businesses would have to research whether and where MS have changed the drafting of the Common European Sales Law with regards to mandatory consumer protection rules. This means that businesses could not be sure to sell across borders on the basis of one single law and would therefore have similar transaction costs as in the BS. (This risk of an increase in legal complexity was raised in several responses to the Green Paper and particularly by business representatives.)

This analysis applies scenario 2 to the impacts below as it would allow some quantification for these impacts as well as simplicity in their presentation; in reality though scenario 3 would be the most likely one to occur. However, scenario 3 is not applied to the impacts because the piecemeal way of incorporation of the Common European Sales Law (if at all) would make it very difficult to quantify the exact impacts upon both B2B and B2C contracts. One could assume that there may be some benefits for traders with B2B contracts, but for those with B2C contracts the likelihood is that the majority of BS impacts would still apply (although the extent of the impacts would be unknown). To apply scenario 3 to the analysis would mean that every impact would reflect the reasoning given above without giving possible quantification.

Administrative costs (included in the overall figure of transaction costs): Some administrative costs would occur for B2C traders using the Common European Sales Law. Otherwise BS administrative costs would apply.

Opportunity costs of foregone trade: The costs for missed opportunities of trade costs are not possible to calculate, however one could assume that they would be less than those set out in the BS (for both B2B and B2C).

Competition in internal market and impact on consumer prices: Compared to the BS, the impact would be greater the more MS incorporate it without changes and at the same time. For those MS who decide not to incorporate it at all/or with changes the impact would be similar to the BS. A more harmonised legal system would incentivise more businesses to trade cross border and would result in increased competition between them. An increase in cross border trade would therefore lead to a rise in imports, which would be likely to increase the competition in the importing MS. To be able to compete in the market, businesses would be encouraged to either by improve the quality of their products or reduce prices. This would contribute towards the Commission policy on increasing competitiveness[324] and would be of particular relevance in B2B transactions which include the manufacturing industry. This would have a positive impact upon consumers and would allow them to further benefit from the internal market; as an increase in the number of traders and more competition between them would give consumers an increased choice of product at a lower price. For scenario 2, the prices are estimated to fall by 0.03-0.06%.[325]

Impact on consumer protection (Applicable to B2C contracts only): The extent of the impact would depend upon the number of MS incorporating the Common European Sales Law entirely and without changes and the number of businesses using it. Depending on the degree of implementation, this option could provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[326] giving consumers confidence that they would have similar rights when using the Common European Sales Law in their own country as they would in all MS

324 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage,' COM (2010) 614.

325 See Annex IV.

326 See Annex VI.

applying the Common European Sales Law. Impact on GDP: Under scenario 2, GDP of the EU is expected to increase by €1.8 to €3.6 billion (0.015% - 0.03%).[327]
Impact on SMEs: SMEs which perform B2C contracts would still incur transaction costs to find out about the level of consumer protection provisions in another country and would incur administrative costs where new information provisions were required. Although difficult to quantify, it is assumed that these costs would have a greater impact upon micro and small enterprises. For SMEs performing B2B contracts, the negotiation of an applicable law between similar sized companies are likely to become easier.[328]
Impact on law firms: There would be a new demand for legal advice from new exporters, as well as from existing exporters who would need to become familiar with the Common European Sales Law. This would create an opportunity for law firms to tap into the new market and expand their business on giving advice on contract law. However as contract law differences would still remain, this option could add a level of complexity as law firms would need to ensure they fully understand the differences of the Common European Sales Law between the MS. In their responses to the Green Paper several practitioner representatives mentioned that there would be a cost for law firms to train and familiarise themselves with the Common European Sales Law, as with all new legislation. However unlike the BS, a very small share of these costs would be relieved given that the Common European Sales Law would be available in all official languages in the EU, and would therefore be more accessible. Some stakeholders were concerned that businesses would no longer choose to use domestic legislation and as a result the law firms that advise on specific national laws for international transactions would move their business to outside of the EU. However, a Common European Sales Law would not replace national laws and businesses could continue to choose their preferred national law in B2B contracts. (Business that choose a particular law compared to other legal systems tend to do so because of its specificities and it would be unlikely that these businesses which already choose it for these reasons would cease to do so.)
Public authorities: MS: The national laws of MS would not be affected. However, MS would bear costs which accompany the implementation of EU legislation (such as consultation of stakeholders, printing of new legislation, educating the public about the new legislation, time and cost of legislative process, etc.) Judiciary: For those MS who choose to incorporate the Common European Sales Law into their national laws, there would be a cost for the judiciary to train and familiarise themselves with the new system However this cost would also apply to the judiciary of MS who have not incorporated the Common European Sales Law as businesses in their B2B contracts may choose to apply the law of a third country (i.e. the Common European Sales Law).
Analysis of provisions of instrument: The analysis of impacts of the main provisions of the instrument are described in Annex VIII.
SOCIAL IMPACTS Compared to the BS, the more that MS incorporate it entirely and without changes the greater the facilitation of cross border trade and increase in employment. Under scenario 2 it is estimated that there would be 74,000-145,000 new jobs in the EU.[329]
ENVIRONMENTAL IMPACTS Compared to the BS, the more that MS incorporate it entirely and without changes the greater the

327 See Annex IV.

328 In the SME Panel Survey, 55% of SMEs responded that the negotiation of applicable law was an important obstacle to cross border trade. In response to a similar question in the EB 320 (p.16) 25% of respondents said that difficulties on agreeing on the foreign applicable contract law had an impact on their decision to trade cross-border. However, as the sample in the EB also included large companies, the results of the SME Panel survey are more relevant for the SME test.

329 See Annex IV

increase in the use of transport. This would have an adverse impact upon the environment as the increase in use of transport for delivery would lead to an increase in CO2 and other vehicle emissions and, would increase the cost to control pollution due to the binding EU rules.
SIMPLIFICATION POTENTIAL Compared to the BS, using scenario 2 this option could create some simplification to the regulatory environment. However this would only apply to those MS which have incorporated the Common European Sales Law entirely and without changes and for those businesses that choose it.
ONLINE ENVIRONMENT The extent of this impact would depend upon the number of MS who incorporate the Common European Sales Law entirely and without changes and the number of businesses who use it. If for instance, compared to the BS, if scenario 2 applied to an online cross border and domestic environment only it would allow businesses the choice to trade under the same law regime for a cross border sale as they would with a domestic one. This would mean businesses that use the Common European Sales Law in those MS which have implemented it entirely and without changes would not need to adapt their terms and conditions and IT platforms to a great degree to trade in another country – this could provide an incentive to businesses to increase their online cross border sales (or commence them). If there were an increase in the number of businesses who used this instrument to trade cross border, then compared to the BS, this option would help towards narrowing the gap between domestic and cross border online sales. However, an instrument dedicated to e-commerce only could lead to increased legal complexity. Companies using distribution channels other than e-commerce would have to apply different legal rules depending on the distribution channel used which would create a fragmentation of the market and distort competition. Furthermore, as mentioned by business representatives in their Green Paper consultation responses,[330] it would not be technologically neutral and thus may generate legal uncertainty should new forms of distance sales occur in addition to e-commerce, for instance mobile telephony commerce. On the other hand, some businesses who responded favoured a scope limited to cross-border online sales only.[331] Such a scope could create additional legal complexity for consumers who could be subject to different rules depending on whether they make a purchase online, at a distance using another method (i.e. post or telephone) or face-to-face.
IMPACT IF THIS OPTION APPLIED IN A DOMESTIC CONTRACT AS WELL AS CROSS BORDER The extent of this impact would depend upon the number of MS which incorporate the Common European Sales Law entirely and without changes. Using scenario 2: Domestic and cross border: Between those MS who incorporate the Common European Sales Law, the legal environment for businesses which trade both cross-border and domestically would be facilitated; if businesses chose to operate under the Common European Sales Law for all contracts. However, for businesses who wish to trade with businesses in those MS who do not incorporate the Common European Sales Law, transaction costs would still occur. Cross border only: Between those MS who incorporate the Common European Sales Law, traders could use one contract law (the Common European Sales Law) for cross border trade with multiple MS (both in B2C and B2B transactions). Thus, they could reduce transaction costs and legal complexity. Those businesses who wished to continue to use their national contract laws for domestic trade would be free to do so; whilst at the same time they would also be able to export using the Common European Sales Law. Therefore, business could save costs when trading cross

330 Eurochambres Position Paper on the Green Paper on policy Options for Progress towards a European Contract Law for Consumers and Businesses, European contract law, January 2011 p.3, European Small Business Alliance response to the Green Paper on policy Options for Progress towards a European Contract Law for Consumers and Businesses, p.4.

331 Eurocommerce response to the Green Paper on policy Options for Progress towards a European Contract Law for Consumers and Businesses, 27 January 2011, p. 3.

border and continue to enjoy their current arrangements under domestic legislation. However, for businesses who wish to trade with businesses in those MS who do not incorporate the Common European Sales Law, transaction costs would still occur (both in B2B and B2C contracts).
OVERALL ASSESSMENT This option would only be effective if the Common European Sales Law was incorporated by a number of MS entirely and without amendment to the original version attached to the Recommendation. If this occurred,[332] the transaction costs for cross border trade would be reduced, there would be more trade and competitiveness in the internal market and consumers would benefit by having an increase in choice of products at a lower price as well as an increased level of consumer protection when they buy abroad using the Common European Sales Law. However, it is highly unlikely that this option would be incorporated entirely or without amendment. This would not greatly affect traders performing a B2B contract (as they would have the freedom to decide on the law applicable to their contract) and therefore, these traders would have the opportunity to reduce their transaction costs by using the Common European Sales Law of one MS which has best implemented it. The same would not be the case for traders performing B2C contracts, as they would have to research whether and where MS have changed the drafting of the Common European Sales Law with regards to mandatory consumer protection rules. This means that businesses would not be able to sell across borders to consumers on the basis of one single law and would therefore incur transaction costs of the type indicated in the BS. Consequently this option would only to a limited extent remove the hindrances to cross-border trade identified in the problem definition. The voluntary nature of the incorporation would mean that the instrument would not be legally binding and there would be no jurisprudence mechanism to ensure its coherence. Overall, because of the piecemeal way in which the Common European Sales Law could be incorporated, if at all, this option would further complicate the regulatory environment for both consumers and businesses as both parties in B2C contracts would be subject to differing degrees of the Common European Sales Law in different MS and the divergences in national contract laws would remain. Many respondents to the Green Paper consultation (business groups, consumer organisations and legal practitioners rejected this option). Because this option would add to the issues set out in the problem definition it is highly unlikely to be suitable as a solution.

4. Policy option 4: Regulation/Directive setting up an optional Common European Sales Law

The optional Common European Sales Law would insert a set of clear and practical rules into each of the different national laws of a MS as a 'second regime'. This second regime would not replace existing legal traditions, but sit alongside a relevant specific national regime. These rules could be voluntarily chosen by the parties as the law applicable to their cross-border contracts. Therefore businesses would have the choice to continue to use their national law in their cross-border transactions or to use the optional Common European Sales Law.

332 In order to estimate the impacts of PO3 assumptions on the number of exporting companies taking up the optional Common European Sales Law have been made. EB 320 and 321 show that 70% of businesses would be likely to use a new Common European Sales Law instrument. Businesses would however need to agree this choice with their business partners. Therefore the more conservative assumptions i.e. 25% and 50% of companies using the Common European Sales Law are applied throughout in the report. This allows demonstrating a range of possible economic impacts.

ECONOMIC IMPACTS

Transaction costs: This option would greatly reduce transaction costs because it would allow businesses to use one set of rules for cross border trade irrespective of the number of countries they trade with in the EU. In practice, this means that businesses using the optional Common European Sales Law may only have to pay one transaction cost for trade with multiple MS.[333] For example, a business exporting to between 1 and 26 MS may only have to pay on average €9,800 for B2B and €9,100 for B2C (plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs), (see BS).

For businesses that already export and decide to expand their sales but decide not to use the optional Common European Sales Law, the costs for exporting to 5 MS could amount to €49,100 for B2B and €45,600 for B2C if the business applied the law of the country traded to in each case. A company applying the optional Common European Sales Law to the same contracts with all 5 MS would save €39,300 and €36,500 respectively. Costs for exports to 10 MS using the law of the country traded to could amount to €98,300 for B2B and €91,100 for B2C. If the trader used the optional Common European Sales Law the costs saved would be €88,500 and €82,000 respectively.

Assuming that initially only 25%[334] of current exporters decide to use the optional Common European Sales Law, one-off implementation costs would amount to €1.89 billion.[335] However a business stakeholder noted, the initial cost of the optional Common European Sales Law would be acceptable when compared to continuing potentially high transaction costs.[336] The estimate of transaction costs does not include the potential higher compliance costs for companies in some Member States where the level of consumer protection would increase (see section on analysis of provisions of instrument).

These costs would however be outbalanced on one hand by costs savings for new exporters and on the other hand by potential savings for current exporters that would expand their cross-border sales to new countries. Using a conservative assumption of 25% of new exporters using the optional Common European Sales Law and the current average level of exports, the annual savings[337] for new exporters would be €150-400 million.[338] In addition, if 25% of the current exporters decide to use the optional Common European Sales Law and start trading with additional EU countries the potential saving would be between €3.7bn and €4.3 bn.[339] (i.e. costs if they were to expand their sales to new countries under the BS €5.6- €6.2 minus one-off cost of implementation €1.89 billion).

These cost savings would have the biggest impact upon SMEs (in particular on micro and small companies) and this is where the optional Common European Sales Law would add the most value for such traders. However the optional Common European Sales Law would also save costs (albeit on a relatively lesser scale)[340] for big businesses who want to use the optional Common European Sales Law to trade with other big businesses. (To ensure all businesses have the opportunity to take

333 This would facilitate the freedom to conduct a business in line with Article 16 of the Charter on Fundamental Rights of the EU. See Annex VI.

334 EB 320 and 321 show that 70% of businesses would be likely to 334. 38% of all the companies surveyed would prefer to use a single European contract law as an alternative to their national law. Businesses would need to agree the choice of using the instrument with their business partners. Therefore assuming that some business partners would not wish to use the Common European Sales Law, the more conservative assumption i.e. 25% of companies using the Common European Sales Law are applied throughout the report.

335 25% of current exporters in B2B and B2C multiplied by the respective costs-see Annex III.

336 ESBA response to the Green Paper consultation, p. 2.

337 Number of new exporters annually multiplied by the average saving – see Annex III.

338 In a longer term, these annual savings could be discounted to €3.9-€10 bn and the net benefit for the EU economy would be €2-€8,11bn (€3.9-€10 bn minus €1.89bn), See Annex III

339 Number of current exporters that decide to use the optional Common European Sales Law (25%) multiplied by the saving depending on the number of additional countries they would make cross-border sales to - see Annex III.

340 The amount a big business spends to trade to the whole of the EU is 0.06% of their average annual turnover (see problem definition).

full advantage of the optional Common European Sales Law and to ensure non exclusivity of the use in terms of application of scope of the instrument, it may be prudent to allow MS to make the choice as to whether big businesses could use the optional Common European Sales Law to contract with other big businesses.)

The reduction in transaction costs would also facilitate intra EU trade by removing obstacles for those companies which currently experience difficulties in either conducting cross-border trade or transferring, for example, property by way of cross border sales and would therefore facilitate the exercise of these rights in line with Articles 16 (Freedom to conduct a business) and 17 (Right to property) of the Charter on Fundamental Rights of the EU, respectively.[341]

Administrative costs (included in the transaction costs): This option would require traders to provide consumers with information about the choice of using the optional Common European Sales Law. For example, companies trading via e-commerce would need to create for example a pop-up window informing a consumer about the application of the optional Common European Sales Law and companies trading via post would need to add similar information, for instance, in a brochure format. This would cost a business approximately €500.[342] However, the application of the optional Common European Sales Law would be voluntary and need only be used by the contractual parties if it offered them a commercial advantage compared to the BS. This is one of the instances where the optional Common European Sales Law safeguards the principle of 'freedom of contract', which was a concern raised by business representatives in response to the Green Paper.

Exporters could achieve cost savings if trading with more than 1 MS as they would be able to use one set of information, available in all EU languages. If a business used the optional Common European Sales Law the administrative costs would amount to (on average) for B2C contracts €2,500 and for B2B €1,500.[343] Compared to the BS if a company traded with 2 MS the cost saving per company would amount €1,500 in B2B and €2,000 B2C transactions. Under an extreme scenario, when a company trades across the whole of the EU, the cost saving per company would amount to €37,500 in B2B transactions and €62,000 in B2C transactions.[344]

Competition in internal market and impact on consumer prices: This option would increase competition in the internal market and lead to a decrease in prices. For B2C contracts 40%[345] of the above mentioned businesses surveyed said that if they were able to choose a single Common European Sales Law they would increase their cross border trade in the internal market. For those performing B2B contracts, this figure was 34%.[346] These surveys have also indicated that 14% of those performing B2B contracts would trade with 6 or more additional countries if they were able to choose a single Common European Sales Law, 34% said they would trade with 3-5 new countries and 35% said they would trade with 1– 2 new countries. For those performing B2C contracts these figures were: 18%, 32% and 32% respectively.

An increase in cross border trade would therefore lead to a rise in imports, which would be likely to

341 See Annex VI.

342 Explained further in Annex VII.

343 See Annex VII for more details on how these costs are calculated.

344 See Annex VII for more details on how these costs are calculated.

345 EB 321, p. 36.

346 EB 320, p.33.

347 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage,' COM (2010) 614.

348 The impacts are computed using the GTAP (see Annex IV).

349 See Annex VI.

350 According to data from EB 342, p. 122-125, most consumers either do not read the terms and conditions (27%) or do not read them carefully and completely (30%). According to Allen and Overy, Online consumer research, 2011: 52% of the consumers in the 6 largest EU MS never (5%) or only occasionally (47%) read the terms and conditions when purchasing online.

increase the competition in the importing MS. To be able to compete in the market, businesses would be encouraged to either by improve the quality of their products or reduce prices. This would contribute towards the Commission policy on increasing competitiveness[347] and would be of particular relevance in B2B transactions which include the manufacturing industry. Consumers would benefit from an increased choice of product at a lower price. Prices are expected to decrease around 0.04-0.07% if 25% of EU companies used the optional Common European Sales Law.[348] The more companies that make use of the optional Common European Sales Law, the greater the probability that companies who do not use the optional Common European Sales Law would need to remain competitive by improving the quality of their products or reducing prices.

Impact on GDP: Overall EU GDP is expected to increase by €5- €10 billion (0.04-0.08%) (see Annex IV).

Impact on third countries: if third countries could choose the optional Common European Sales Law, they would benefit from an easier access at lower transaction costs to the whole EU market and may be able to expand exports to more EU countries. If they could not use the optional Common European Sales Law, some negative impact could be possible, provided that trade would grow more between EU countries at the expense of potential partners from third countries.

Impact on consumer protection This option would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[349] by increasing consumer protection in certain areas which are currently harmonised at minimum level, by creating a high level of consumer protection in areas in which the Union has not previously acted by integrating the fully harmonised provisions of the CRD and by taking the other minimum harmonisation provisions of the acquis as a benchmark.

The optional Common European Sales Law would strengthen rights on some points of particular concern to consumers compared to the existing acquis. For instance, the consumer could choose the type of remedy if the goods did not conform to the contract; these remedies would also be available to consumers who bought digital content products which also did not conform to the contract. These and other consumer protection provisions would give consumers confidence that they would have a very high level of consumer protection whenever they used the optional Common European Sales Law.

To strengthen certainty about their rights and thereby consumer confidence, businesses would provide consumers with a standardised information notice whenever the optional Common European Sales Law was chosen for use. This information notice would explain that Common European Sales Law applied and would set out information about the key rights consumers would enjoy under the optional Common European Sales Law. The provision of this information responds to some concerns (i.e. increase of the legal complexity, inability for the consumer to make an informed choice for the application of the optional Common European Sales Law) raised by consumer and legal practitioner representatives in their responses to the Green Paper. Within this setting the optional Common European Sales Law could encourage more consumers to shop across-border, as they would have the same rights at a high level of protection everywhere in the EU, whenever the optional Common European Sales Law would apply. Moreover, the information notice would be beneficial for the large percentage of consumers who do not always read terms and conditions, as it would present their key rights in a concise and prominent way before they agree to the contract.[350] If this information is not provided to the consumer, then the consumer would have the right to terminate the contract without bearing any costs. In addition, the agreement would only be valid if the consumer consented - in a separate statement - to using the optional Common European Sales Law. A business would therefore not be allowed to include the choice of the optional Common European Sales Law as only a term in his standard terms and conditions.

The optional Common European Sales Law could become a 'trustmark' for consumers: once they have become familiar with their rights under the optional Common European Sales Law, they would become more certain and therefore confident in purchasing products across the EU under the optional Common European Sales Law's uniform rules. Additionally, the optional Common European Sales Law could be of an advantage to the economic interests of consumers, as they could gain access to more and better offers at a cheaper price, which would not have been made available by foreign businesses if the optional Common European Sales Law had not existed. Thus, the information notice and the explicit separate statement of consent the consumer will have to provide would also eliminate the fears of several MS and consumer associations who have some concerns about the optional Common European Sales Law, as they think businesses could take advantage of the weaker position of the consumers, as the latter would not be fully able to understand the consequences of choosing an optional Common European Sales Law.
Impact on SMEs: There would be a positive impact upon SMEs trading with more than 1 MS. Micro and small companies would benefit in particular as the cost savings of using the optional Common European Sales Law would be disproportionately high compared to the BS. For B2C contracts, if the optional Common European Sales Law were chosen, it would be the only applicable law in the area covered by its scope. Therefore, the trader would have to consider only one set of rules – those of the optional Common European Sales Law. It would no longer be necessary to consider other national mandatory provisions as they would normally have to when concluding a contract with a consumer from another MS. There would be some administrative costs where provision of information would be required.[351] However these costs would be unlikely to outweigh the cost savings, especially for those companies trading in multiple MS. The standardised information notice for the optional Common European Sales Law would limit the administrative costs: Businesses will not be required to provide individual explanations of the consequences of the use of the optional Common European Sales Law to the consumer, as the information notice would fulfil this purpose. For SMEs concluding B2B contracts the negotiation of an applicable law[352] would not be so burdensome anymore.[353] Two SMEs could be more willing to agree on the optional Common European Sales Law as a 'neutral' contract law. As both parties would have equal access to this law as part of their national system, neither of them would be in a weaker position compared to the situation where one of them would be as the applicable law would be unknown to that party. Evidence shows that a law which is considered 'neutral' and is available in multiple languages such as the Swiss law, is more likely to become the preferred choice of law.[354]
Impact on law firms: There would be a new demand for legal advice from new exporters, as well as from existing exporters who would need to become familiar with the optional Common European Sales Law. This would create an opportunity for law firms to tap into the new market and expand their business on giving advice on contract law. In their responses to the Green Paper several practitioner representatives mentioned that there would be a cost for law firms to train and familiarise themselves with the optional Common European Sales Law, as with all new legislation. However unlike the BS, some of these costs would be

351 See Annex VIII.

352 Article 16 of the Charter of Fundamental Rights of the EU. See Annex VI.

353 In the SME Panel Survey, 55% of SMEs responded that the negotiation of applicable law was an important obstacle to cross border trade. In response to a similar question in the EB 320 (p.16) 25% of respondents said that difficulties on agreeing on the foreign applicable contract law had an impact on their decision to trade cross-border. However, as the sample in the EB also included large companies, the results of the SME Panel survey are more relevant for the SME test.

354 Stefan Voigt, Journal of Empirical Legal Studies, Volume 5, Issue 1, 1–20, March 2008, "Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory", p. 17.

relieved given that the optional Common European Sales Law would be user-friendly, clear and available in all official languages in the EU, and would therefore be more accessible. Moreover there would be public funding available for training on new EU legislation.[355]

In time, there could be a chance that law firms could advise less, which would mean less billable hours for them. However this would be mitigated by the increased flow of new businesses entering the 'cross-border-trade' market and the expansion of existing client advice to a wider range of cross-border transactions covering all MS.

The simultaneous application of the optional Common European Sales Law by national courts would allow case law to build up quickly. The uniform application would be ensured firstly by the ultimate interpretation of the optional Common European Sales Law through the ECJ. A database, accessible to judges and legal practitioners and containing translated summaries of national rulings applying optional Common European Sales Law provisions would ensure transparency and de-facto convergence of relevant case-law. This would alleviate concerns related to legal certainty raised by some Green Paper respondents.

Legal stakeholders were mostly positive towards this option. Some stakeholders from the UK expressed views[356] that this option would make the UK, and in particular London, a less attractive place for, in particular, large companies (who are advised to use common law as their preferred choice of law for international transactions) to obtain legal advice from English law firms. These stakeholders maintain that as a result, the expenses for legal advice[357] made by these businesses would be lost to the UK as companies would obtain legal advice in the US. While these submissions are relevant for PO5/6, they do not really apply to PO4.

An optional Common European Sales Law would not replace national laws. It would become a second regime existing alongside domestic legislation, which could be chosen as an alternative to the national law, only when businesses see fit. Since English law is chosen by companies because of its specificities, compared to other legal systems it is unlikely that companies which already choose it for these reasons would cease to do so.

Thus companies could continue to use common law and the services of English law firms if they choose to do so. In this context it is important to note that the number of EU exporting companies using the law of a 3rd country (for instance English law or Swiss law) is at any rate only 0.6% of EU exporters.[358] SME from non Common law practising countries would not be likely to apply Common law to their contracts (e.g. a Swedish SME trading with an Italian SME would be more likely to use Swedish or Italian law). However a UK based SME trading with a non-Common law country would still have the choice to use common law.

<u>Public authorities:</u>

There would be a cost concerning a data-base which would be created and maintained by the

355 In 2010 the European Commission made available €12 million of funding for judges and prosecutors (and lawyers to a lesser extent) to train on EU new legislation. The cost per trainee was about €1,400. The Commission will continue to finance training and will publish a Communication on this topic by the end of 2011 in which the training on a Common European Sales Law instrument will be mentioned as a priority.

356 Law Society of England and Wales Response to the Green Paper, p.17 – 20; Bar Council of England and Wales response to the Green Paper p.20 and p.21; COMBAR response to the Green Paper p.3; City of London Law Society response to the Green Paper on contract law p. 2.

357 According to the Bar Council of England and Wales Response to Green Paper p.20 and p.21 "Currently the annual fee income of the 100 largest law firms is approaching £15bn, with over half of that revenue being generated by London – based law firms." According to the Law Society of England and Wales Response to the Green Paper p.18. "The City Business series Report on Legal Services in 2007 valued the contribution of legal services to the UK economy at £14.9bn in 2004". However it would need to be noted that the income mentioned above seems to refer to the contributions of all legal services, not just on contract law. Therefore income solely due to the areas of contract law as defined under section 4.2.3. of the IA report in a cross border scenario would be a relatively small percentage of this overall income.

358 EB 320, p. 57

Commission. This database would contain summaries of rulings of the application of the optional Common European Sales Law provisions (as submitted by national courts). This cost would fall upon the Commission and would be broken down as follows:
- one-off approximately €100,000[359] for creating the website and database;
- annually approximately €100,000[360] for maintaining the website and database;
- €160.56 for summarising a ruling submitted by a MS' court (assuming that it will take 4 hours to read and summarise one ruling and a documentalist is paid €321.12[361] a day), and
- €117 for the translation of a summary in English, French and German (assuming that each summary will be one page and the translation cost will be €39[362] per page).

Member States: The national laws of MS would not be affected. However, MS would bear the costs which would accompany the implementation of EU legislation (such as consultation of stakeholders, printing of new legislation, educating the public about the new law, time and cost of legislative process, etc.)

Judiciary: As raised in the Green Paper consultation, there would be a need for some initial training for judiciaries familiarise themselves with a new system. However this cost would be mitigated by public funding available for training on the new EU legislation.[363] All legal practitioners across the EU would have access to a database containing summaries of rulings on the application of the optional Common European Sales Law. This would allow them to view the application of the optional Common European Sales Law and ensure the consistency of its future use. The use of this option, i.e. a consistent reference to a single body of rules, would remove the necessity for judges to investigate foreign law and compare several laws decreasing litigation costs compared to the BS. In the longer term, this would alleviate the administrative load on a MS judicial system. Moreover, the database would also reduce the risk of a different application and interpretation of the optional Common European Sales Law mentioned by several respondents to the Green Paper.

European Court of Justice (ECJ): In the first instance national courts would rule upon cases and submit summaries which would be entered into the Commission created database. These summaries are likely to lead to a defacto convergence of rulings by national courts which national judges would be able to access when needing to refer to how provisions of the optional Common European Sales Law have been ruled upon. There may be a limited number of cases which may need to be referred to the ECJ,[364] which would increase the caseload. There would be a financial cost of referral of a case which would need to be borne by the parties to the trial.

Analysis of provisions of instrument: The analysis of impacts of the main provisions of the instrument is described in Annex VIII.

359 In 2002 a database (JURE data-base) was created for summaries of judgements concerning the Brussels I Regulation no 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, the Brussels II Regulation no 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, the new Brussels II Regulation no 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses, repealing Regulation no 1347/2000 and the Convention of 16 September 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters (Lugano Convention). The creation of this database cost at that time almost €80.000.

360 In the past four years the maintenance of the JURE data-base has cost on average €117.500. As the new data-base will likely be linked with the system of an existing data-base – e.g. the data-bases on the e-justice portal – the cost will assumable be lower.

361 Annex 1 of amendment №4 to Framework contract noJLS/2008/A5/01/lot 21 "Websites, web content management systems and other computer services".

362 Price list in the Framework contract noJLS/2008/A5/01/lot 21 "Websites, web content management systems and other computer services".

363 In 2010 the European Commission made available €12 million of funding for judges and prosecutors (and lawyers to a lesser extent) to train on EU new legislation. The cost per trainee was about €1.400. The Commission will continue to finance trainings and will publish a Communication on this topic by the end of 2011 in which the training on a Common European Sales Law instrument will be mentioned as a priority.

364 This increase of caseload would form a minor part of the ongoing overall institutional and budgetary discussion of the of the resources and responsibilities of the ECJ.

SOCIAL IMPACTS

The more businesses that use this option, the greater the extent of the positive impact on trade and growth. Compared to the BS, this option would help to facilitate cross border trade and as a result would create 159,300-315,900 new jobs in the EU if 25% of companies use the optional Common European Sales Law.[365]

With regard to impacts on fundamental rights, this option would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality, in line with Article 21(2) of the Charter of Fundamental Rights of the EU. Moreover, it would be effective in removing the contract law related barriers, which may be a reason for the traders' practice of refusal to sell to consumers resident in other Member States. It may also contain a rule providing that contract terms which restrict privacy rights are unfair and therefore non-binding on the consumer (in line with Article 8 of the Charter).

ENVIRONMENTAL IMPACTS

This would be dependent upon the number of businesses who use the optional Common European Sales Law, as an increase in use of transport for delivery would lead to an increase in CO2 and other vehicle emissions and would increase the cost to control pollution due to the binding EU rules.

SIMPLIFICATION POTENTIAL

For business: Compared to the BS, this option would simplify the regulatory environment, eliminating the need for research of different national laws as only one regulatory framework need be used.

For consumers: While they could be subject to a new unfamiliar system,[366] the standardised information notice would aid consumer understanding of the optional Common European Sales Law by explaining in a concise and prominent way the use and implications of an optional Common European Sales Law.

ONLINE ENVIRONMENT

Compared to the BS, this would be a more simple[367] way to conclude a contract and give a trader cost savings. The additional transaction costs would no longer apply: Businesses would not need to adapt their terms and conditions and IT platforms to take into account the laws of all Member States they trade with. This could provide an incentive to businesses to increase their online cross border sales (or in some cases to commence them). If there were an increase in the number of businesses who used this instrument to trade cross border, then compared to the BS, this option would help towards narrowing the gap between domestic and cross border online sales.

However, an instrument dedicated only to e-commerce could lead to increased legal complexity. Companies using distribution channels other than e-commerce would have to apply different legal rules depending on the distribution channel used. This would create a fragmentation of the market and distort competition. Furthermore, as mentioned by business representatives in their Green Paper consultation responses,[368] it would not be technologically neutral and thus may generate legal uncertainty should new forms of distance sales occur in addition to e-commerce, for instance mobile telephony commerce. A scope limited to cross-border online sales only could however also create additional legal complexity for consumers who could be subject to different rules depending on whether they make a purchase online, at a distance using another method (i.e. post or telephone) or face-to-face.

365 The calculation of this impact can be found in Annex IV.

366 BEUC's response to the Green Paper, p.15.

367 Allen and Overy, Online Consumer Research, found that a relative majority of 46% of the surveyed consumers in the 6 largest MS would be more likely to buy online from another EU country if an EU-wide contract law was put in place.

368 Eurochambres response to the Green Paper, p.3, European Small Business Alliance response to the Green Paper, p.4.

IMPACT IF THIS OPTION IS APPLIED IN A DOMESTIC CONTRACT AS WELL AS CROSS BORDER Domestic and cross border: An optional Common European Sales Law would facilitate the legal environment for businesses which trade both cross-border and domestically, if they chose to operate under the optional Common European Sales Law for all contracts. On the one hand, if the optional Common European Sales Law also applied in a domestic context it would go beyond what would be necessary to resolve the problem of additional transaction costs and legal complexity. It would therefore not be a proportionate solution to the problem. On the other hand, several respondents to the Green Paper favoured this scope.[369] However as many respondents who favoured this scope, also favoured a cross border only scope. Therefore a more pragmatic solution may be to allow MS the choice as to whether they would also like the optional Common European Sales Law to apply in domestic contracts too. Cross border only: Traders could use one contract law (the optional Common European Sales Law) for cross border trade with multiple MS (both in B2C and B2B transactions). Thus, they could reduce transaction costs and legal complexity. Businesses could continue to use their national contract laws for domestic trade, whilst at the same time they would also be able to export using the optional Common European Sales Law if they wish to do so. Therefore, business could save costs when trading cross border and continue to enjoy their current arrangements under domestic legislation. A cross border only scope is in accordance with the principle of proportionality as the instrument does not go beyond what is necessary to achieve the objectives. Several respondents to the Green Paper,[370] who commented on this, favoured an instrument which was limited to cross border contracts (in some cases as a first step).
OVERALL ASSESSMENT This option would not replace existing domestic regimes, but complement the national law of MS, as it would be inserted into their national laws as an optional set of contract law rules which could be used for trading across borders. It need only be chosen by parties voluntarily only when it suits their interests. The main advantage of this option is that it would eliminate the transaction costs which are incurred by businesses when trading with more than one MS. On a relative scale in comparison to annual turnover, this advantage would benefit trade for businesses performing B2C contracts and those B2B contracts which are between SMEs. As it would also offer cost savings to large businesses which contract with other large businesses, this combination for the application of the scope of the optional Common European Sales Law should not be ruled out. It could be left to MS to decide upon. The decrease in costs would provide incentives to increase trade which would result in more competition in the internal market. The increase in trade and competition would benefit consumers by giving them more product choice at a lower price. There could be some administrative costs which arise from the need for businesses to provide information to consumers not previously required. These costs are however by far outweighed by the savings and the potential savings which are made from not paying the additional transaction costs for when a business trades with more than 1 MS. This option would create opportunities for

369 Member States: EE, LT and NL. Stakeholders (business): BIPAR, EMOTA, UPSI, Eurochambres, EFBS, ICAEW, UEL, I.A.N.U.S., Allianz SE, Audi AG, LVMH, Nokia. Legal practitioners: CCBE, Bundesrechtsanwaltskammer, Scottish Law Commission, Ordre des Barreaux Francophones et Germonophone de Belgique, Deutscher Richterbund, Scottish Law Commission, Law Society of Scotland, Law Society of Ireland.

370 Member States: AT, BG, EL, FI, DE, PL. Stakeholders (business): AMICE, FEDSA, APCMA, BdB, EuroCommerce, FAEP, CCIP, Bundesverband der Deutschen Industrie. Legal practitioners: CLLS, CNUE, Bundesnotarkammer, Österreichische Notariatskammer, DBF, Association of Spanish Property and Commercial Registrars, ELRA, UNCC. Stakeholders (consumer): VZBV, Belgian Consumer Organisation.

legal practitioners to cater for new clients as law firms would experience an increase in demand by those expanding their cross-border trade and existing exporters wishing to use the optional Common European Sales Law.

Overall, this policy option meets the policy objectives as it reduces costs for businesses and offers a less complex legal environment for those who wish to trade cross border to more than one MS and at the same time it provides a high level of consumer protection, whilst simplifying the regulatory environment.

5. Policy option 5 and policy option 6[371]

5.1. Policy option 5a: Full harmonisation Directive on a mandatory Common European Sales Law and policy option 6: Regulation establishing a mandatory Common European Sales Law

The end result of a full harmonisation Directive (once it has been implemented) and a Regulation replacing national laws would be very close in their outcome (although not exactly the same); therefore both these options are assessed together.[372] The instrument would allow businesses to use one set of rules in B2B and B2C contracts for both domestic and cross border trade[373] irrespective of the number of countries they trade with in the EU. It would also remove the necessity for businesses to investigate, compare and possibly adapt to several foreign laws.

ECONOMIC IMPACTS

Transaction costs: The instrument would considerably increase costs as it would also affect companies which do not wish to trade cross border. Companies that trade only domestically (17,136,213 in B2B and 4,420,563 in B2C) would face a one off instant cost of implementation of €208.8 billion[374] to use the new legislation. They would be required to pay these costs with no real financial gain, as the advantages would only be realised for those companies trading across a border.

All current exporters would face a one-off cost of implementation of €8.18 billion in order to use the new law.[375] The estimate of transaction costs do not include the potential higher compliance costs for companies in some Member States where the level of consumer protection would increase. There would not be an additional cost if a business were to export to more than 1 MS.

The cost for a micro firm to enter the whole of the EU market would be on average only 6.5% of their turnover[376] which would be the same as it would have cost to trade with only 1 MS in the BS. This option would result in costs savings for new exporters and for current exporters who would expand their cross-border sales to new countries. The annual savings for new exporters would be between €0.63-1.6 bn.[377] In addition, similarly as under option 4 the current exporters that would start trading with additional countries would save at least between €3.7 billion and €4.3 billion.[378] The potential benefits of this option would however not outweigh the initial one-off adaptation cost even over a longer time span.

371 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

372 For simplicity the Directive and Regulation are referred to collectively as the 'instrument'

373 Article 16 of the Charter of Fundamental Rights of the EU. See Annex IV.

374 Businesses who trade only domestically, multiplied by the relative individual one off costs for B2B and B2C.

375 All exporters in B2B and B2C multiplied by the respective costs. Per business this would be €9,100 for B2C (plus €2,900 for e-commerce oriented enterprises selling to consumers that face additional contract law related IT costs) and €9,800 for B2B as in the BS.

376 See section 2.3.2 on problem definition

377 Number of new exporters annually multiplied by the average saving – see Annex III

378 -See Annex III.

The reduction in transaction costs would also facilitate intra-EU trade by removing obstacles for those companies which currently experience difficulties in either conducting cross-border trade or transferring, for example, property by way of cross border sales and would therefore facilitate the exercise of these rights in line with Articles 16 (Freedom to conduct a business) and 17 (Right to property) of the Charter on Fundamental Rights of the EU, respectively.[379]

Administrative costs (these are included in the transaction costs above): The instrument would create an additional burden for all companies to adapt to the new legislation and would be especially costly for those companies that do not want to trade cross border but would have no choice but to apply the instrument to a domestic contract without any economic advantages or cost savings. The instrument would create an additional cost for 22 million companies (including for those who trade only domestically) in the EU with an average one-off cost per company amounting to €2,500 for those performing a B2C contract and €1,500 for those performing a B2B contract. Compared to the BS, to trade with 2 MS the cost saving per company would amount to €1,500.[380]

Competition in internal market and impact on consumer prices: The instrument would increase competition in the internal market and lead to a decrease in prices. For B2C contracts 40%[381] of the above mentioned businesses surveyed said that if they were able to choose a single Common European Sales Law they would increase their cross border trade in the internal market. For those performing B2B contracts, this figure was 34%.[382] These surveys have also indicated that 14% of those performing B2B contracts would trade with 6 or more additional countries if they were able to choose a single Common European Sales Law, 34% said they would trade with 3-5 new countries and 35% said they would trade with 1– 2 new countries.

For those performing B2C contracts these figures were: 18%, 32% and 32% respectively. An increase in cross border trade would lead to a rise in imports, which would be likely to increase the competition in the importing MS. The higher competition would encourage businesses to become more innovative and improve the quality of their products or to reduce prices in order to stay competitive. This would contribute towards the Commission policy on increasing competitiveness[383] and would be of particular relevance in B2B transactions which include the manufacturing industry. Consumers would benefit from an increased choice of product at a lower price. The reduction for the average consumer price level would range between 0.14% - 0.28%.[384]

Impact on GDP: Overall EU GDP is expected to increase by €20- €40 billion (0.17-0.33%).[385]

Impact on third countries: Third countries trading with the EU would bear some one-off implementation costs, but could benefit from an easier access to the EU market as a whole in the long term. Third countries may be able to expand exports to more EU countries.

Impact on consumer protection The instrument would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[386] and would also increase

379 See Annex VI.

380 See Annex VII for more details.

381 EB 321, p.36

382 EB 320.,p.33

383 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage,' COM (2010) 614.

384 GTAP model, see Annex IV.

385 See Annex IV.

386 See Annex VI.

387 Allen and Overy, Online Consumer Research, found that a relative majority of 46% of the surveyed consumers in the 6 largest MS would be more likely to buy online from another EU country if an EU-wide contract law was put in place.

consumer certainty and therefore confidence, as consumers would have the same rights when shopping cross border.[387]However, it would also replace national laws and could lead to changes to the level of protection consumers in certain MS enjoy. While the consumer would benefit from an increase in the protection for a number of provisions, some consumers could lose protection in specific cases compared to their existing national law as their national law would have to be changed.
Impact on SMEs: For businesses trading cross border, this impact would be the same as PO4. However the instrument would also place administrative costs on domestic businesses who do not wish to trade cross border. This would have a particular impact upon micro and small enterprises and comparative to their turnover, would weigh more heavily (compared to the BS). These SMEs would be required to pay these costs with no real financial gain, as this advantage would only be realised for those companies trading across a border.
Impact on law firms: There would be an increase in the demand for legal services, as more businesses would need to understand how to use the instrument even for those advising on domestic transactions. There would be training costs for law firms as they familiarise themselves with the changes in their national law. The concerns highlighted by legal stakeholders in the UK in PO4 are most relevant here as the contract laws among MS would be harmonised and comparative advantages of a specific law like common law as a popular option for choice of law would be fundamentally diminished.
Impact on Public authorities: Member States: The national laws of MS would be affected as this instrument would require a complete overhaul of the domestic legislation. MS would bear the costs which would accompany the implementation of EU legislation (such as consultation of stakeholders, printing of new legislation, educating the public about the new law, time and cost of legislative process, etc.) MS' governments are likely to find the instrument (to change domestic legislation for contract law in such a fundamental way) to be politically sensitive. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with principle of subsidiarity or proportionality. Judiciary: The judiciary of MS would need to familiarise themselves with the new instrument, this would mean a substantive financial cost for training. . A single body of rules would remove the necessity for judges to investigate foreign law and compare several laws. This would decrease litigation costs (compared to the BS) and could in time alleviate the administrative load on a MS judicial system. European Court of Justice (ECJ): In the first instance national courts would rule upon cases and submit summaries which would be entered into the Commission created database. These summaries are likely to lead to a *de facto* convergence of rulings by national courts which national judges would be able to access when needing to refer to how provisions of the optional Common European Sales Law have been ruled upon. There may be a limited number of cases which may need to be referred to the ECJ,[388] which would increase the caseload. There would be a financial cost of referral of a case which would need to be borne by the parties to the trial.
Analysis of provisions of instrument: The analysis of impacts of the main provisions of the instrument is described in Annex VIII.
SOCIAL IMPACTS
This option would help to facilitate cross border trade and as a result would be expected to increase

388 This increase of caseload would form a minor part of the ongoing overall institutional and budgetary discussion of the of the resources and responsibilities of the ECJ.

output and employment. The instrument is expected to create between 650,000 and 1.3 million new jobs.[389] However this positive impact of job creation is likely to be counteracted by the costs incurred by all companies and may lead to some initial decrease in employment, which only at a later time would be compensated due to the positive effects on the economy stemming from the raise in intra-EU trade.

With regard to impacts on fundamental rights, this option would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality, in line with Article 21(2) of the Charter of Fundamental Rights of the EU. It would be effective in removing the contract law related barriers, which may be a reason for the traders' practice of refusal to sell to consumers resident in other Member States. It may also contain a rule providing that contract terms which restrict privacy rights are unfair and therefore non-binding on the consumer (in line with Article 8 of the Charter).

ENVIRONMENTAL IMPACTS

This instrument would have an adverse impact upon the environment as an increase in trade would increase the use of transport for delivery. This would lead to an increase in CO2 and other vehicle emissions and would increase the cost to control pollution due to the binding EU rules.

SIMPLIFICATION POTENTIAL

Compared to the BS, this instrument would simplify the regulatory environment as the differences between the contract laws of MS would be eliminated.

ONLINE ENVIRONMENT

If the instrument applied to an online cross border and domestic environment only, it would allow businesses applying the instrument to offer their products online and across the EU based on the same set of contract law rules. This would mean businesses would not need to adapt their terms and conditions and IT platforms (the latter to a great degree) to trade in another country – this could provide an incentive to businesses to increase their online domestic and cross border trade. Compared to the BS, this option could help towards narrowing the gap between domestic and cross border online sales as businesses would be encouraged by the use of one contract to offer their products in more MS.

However, an instrument dedicated to cross border and domestic e-commerce only may lead to increased legal complexity. Companies using distribution channels other than e-commerce would have to apply different legal rules depending on the distribution channel they use. Furthermore, it would not be technologically neutral and thus may generate distortion of competition should new forms of distance sales occur in addition to e-commerce, for instance ‘mobile telephony commerce’. Such a solution could also create additional legal complexity for consumers who could be subject to different rules depending on whether they make a purchase online, at a distance using another method (i.e. post or telephone) or face-to-face.

IMPACT IF THE INSTRUMENT IS APPLIED CROSS BORDER ONLY

Traders could use one contract law for cross border trade with multiple MS (both in B2C and B2B transactions) and reduce transaction costs. With a cross border scope only, the instrument would comply with the subsidiarity principle as the problem of additional transaction costs arises when businesses export.

However, the instrument would not comply with the proportionality principle as it would go beyond what is necessary to solve the problem. The instrument would replace all national contract laws in relation to cross border contracts. All exporting firms would *have* to use the instrument in their

389 See Annex IV, the GTAP model.

cross border contracts (rather than having a choice to). Those firms who are already exporting would mandatorily have to adapt their contracts to the new instrument – even if they have no desire to enter a new market - and incur once again the additional transaction costs. These transaction costs (€8.18 billion for all current exporters) above would apply to all exporting firms. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with principle of subsidiarity or proportionality.
OVERALL ASSESSMENT Compared to the BS, the instrument would remove obstacles to cross border trade in the internal market as the transaction costs for cross border trade would be diminished. The instrument would facilitate trade and could make it easier for businesses to expand across borders, as they would only need to use one set of rules. There would be an increase in the level of consumer protection allowing consumers to have more confidence to purchase across border and give them increased access to goods. In the longer term, legal practitioners would benefit as they would experience an increase in demand by new clients who would need to understand the instrument for domestic and cross-border contracts. However, it is likely to lead to a loss of income for UK law firms in the area of provision of legal advice on Common law to businesses if these companies chose to obtain legal advice in the United States. The instrument would have very substantial costs attached to it: Although the transaction costs for cross border trade would no longer exist, businesses which only trade domestically would face a very substantial cost to use the new instrument without an added value. A cross border only scope would not be a proportionate solution as businesses who do not want to use it would have to adapt their contracts and incur transaction costs. MS would be likely to find this option politically very difficult to agree and to implement as it would eliminate domestic laws and legal traditions. The majority of MS who responded to the Green Paper consultation rejected this option outright. Overall, although the instrument would harmonise existing contract law legislation and eliminate transaction costs, it would create other substantive costs – which would not only be of monetary value. Therefore from a holistic perspective, taking all the costs (monetary or otherwise) into account, these costs outweigh by far the benefits of the instrument.

5.2. Policy option 5b: Minimum harmonisation Directive on a mandatory Common European Sales Law[390]

As this option is in the form of a minimum harmonisation Directive, MS would not have to implement it at the same time and could implement legislation beyond the consumer protection level of the Directive. The differences in timing of the implementation could restrict for some time the usability of the instrument. As experience with existing minimum harmonisation Directives shows, the level of implementation is likely to maintain a considerable number of differences in national contract laws.

ECONOMIC IMPACTS <u>Transaction costs</u>: This option would increase costs as it would affect domestic companies who do

390 The analysis takes account of several suggestions put forward by the majority of the respondents to the Green Paper concerning the scope of application and the material scope of an instrument, as well as other suggestions on scope including an instrument applicable in an online environment only and in a domestic and cross border setting.

not wish to trade cross border. Companies that trade only domestically (17,136,213 in B2B and 4,420,563 in B2C) would face a one off cost of €208.8 billion[391] to use the new legislation. All current B2B exporters would have to pay the same costs set out in Policy Option 5a (PO5a) (€6.47 billion, per business this would be €9,800). Because of the minimum harmonisation character of the Directive, the levels of consumer protection would vary from MS to MS. To comply with the Directive, these differences would need to be researched by businesses that carry out B2C contracts. Therefore the costs for business that perform B2C contracts would be (at the very least those set out in the BS) between €4.6 billion and € 8.7 billion[392] (per business this would be €9,100 as in the BS). The exact costs would depend upon the extent to which a MS has implemented the Directive. The more changes that exist between MS laws the more the level of costs would increase to match the differences in existence between the MS.

The Directive could facilitate intra EU trade by removing obstacles for those companies which currently experience difficulties in either conducting cross-border trade or transferring, for example, property by way of cross border sales and would therefore facilitate the exercise of these rights in line with Articles 16 (Freedom to conduct a business) and 17 (Right to property) of the Charter on Fundamental Rights of the EU, respectively.[393]

Administrative costs (these are included in the transaction costs above): To a large extent the impact would be the same as PO5a, however because of the necessity to research the differences in national contract laws for B2C contracts, in addition to the costs set out in PO5a, the BS administrative costs for exporters would remain largely unchanged. See Annex VII for more details on how these costs are calculated.

Competition in internal market and impact on consumer prices: For B2B contracts the use of a Directive could increase trade (as set out in policy option 5a PO5a) as transactions costs would be eliminated. For B2C contracts, there may be a less of an increase in trade as the differences between the mandatory consumer protection rules of MS would still need to be researched and therefore the BS would apply. Where trade does increase, it would be likely to increase the competition in the importing MS. The higher competition would encourage businesses to become more innovative and improve the quality of their products or to reduce prices in order to stay competitive. This would contribute towards the Commission policy on increasing competitiveness[394] and would be of particular relevance in B2B transactions which include the manufacturing industry. Consumers would benefit from an increase choice of product at a lower price. For this option, as the impact on consumer prices are dependent upon the extent of the implementation of the Directive they are difficult to quantify.

Impact on GDP: The actual impact upon EU GDP is difficult to quantify as transactions costs would still occur.

Impact on consumer protection: As per PO5a although the instrument would provide a high level of consumer protection (in line with Article 38 of the Charter of Fundamental Rights of the EU)[395] it would also replace national laws and could lead to changes to the level of protection consumers in certain MS enjoy. While the consumer would benefit from an increase in the protection for a number of provisions, some consumers could lose protection in specific cases compared to their existing national law as their national law would have to be changed. In addition to this, because of the minimum harmonisation character of the Directive, the levels of consumer protection would vary from MS to MS. These differences could increase consumer uncertainty and decrease consumer

391 Businesses who trade only domestically, multiplied by the relative individual one off costs for B2B and B2C.

392 No of B2C exporters (184,670) multiplied by €9,100, multiplied by 2.7 and 5.1 (low and high estimates of average numbers of countries exported to. Further details of calculations can be found in Annex III.

393 See Annex VI.

394 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage' http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0614:FIN:EN:PDF (last visited: June 2011)

395 See Annex VI.

confidence as the same situation as the BS would in effect still apply.

Impact on SMEs: For B2B cross border contracts this impact would be the same as PO4, for B2C cross border contracts this impact would be the same as the BS. However the Directive would also place administrative costs on domestic businesses who do not wish to trade cross border. This would have a particular impact upon micro and small enterprises and comparative to their turnover, would weigh more heavily (compared to the BS). These domestic trading SMEs would be required to pay these costs with no real financial gain, as this advantage would only be realised for those companies trading across a border.

Impact on law firms: There would be an increase in the demand for legal services, as more businesses would need to understand how to use the instrument even for those advising on domestic transactions. There would be training costs for law firms as they familiarise themselves with the changes in their national law. The concerns highlighted by legal stakeholders in the UK in PO4 are most relevant here as the contract laws among MS would be harmonised and comparative advantages of a specific law like common law as a popular option for choice of law would be fundamentally diminished.

Impact on Public authorities: Member States: The national laws of MS would be affected as this instrument would require a complete overhaul of the domestic legislation. MS would bear the costs which would accompany the implementation of EU legislation (such as consultation of stakeholders, printing of new legislation, educating the public about the new law, time and cost of legislative process, etc.) MS' governments are likely to find the instrument (to change domestic legislation for contract law in such a fundamental way) to be politically sensitive. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected both options 5 and 6, stressing that to solve the problem of differences in contract laws, this type of instrument was not consistent with principle of subsidiarity or proportionality.

Judiciary: The judiciary of MS would need to familiarise themselves with the new instrument, this would mean a substantive financial cost for training. In the longer term, a consistent reference to a single body of rules would remove the necessity for judges to investigate foreign law and compare several laws. This would decrease litigation costs (compared to the BS) and could in time alleviate the administrative load on a MS judicial system.

European Court of Justice (ECJ): In the first instance national courts would rule upon cases and submit summaries which would be entered into the Commission created database. These summaries are likely to lead to a *de facto* convergence of rulings by national courts which national judges would be able to access when needing to refer to how provisions of the optional Common European Sales Law have been ruled upon. There may be a limited number of cases which may need to be referred to the ECJ,[396] which would increase the caseload. There would be a financial cost of referral of a case which would need to be borne by the parties to the trial.

Analysis of provisions of instrument: The analysis of impacts of the main provisions of the instrument are described in Annex VIII.

SOCIAL IMPACTS

This option would help to facilitate cross border trade and its use would be expected to increase output and employment. The number of jobs created by this option is difficult to quantify (as it would depend upon the extent of the implementation of the Directive), one could expect an increase, although not as high as the increase for policy option 5a.

With regard to impacts on fundamental rights, this option would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality, in line with Article 21(2) of the Charter of Fundamental Rights of the EU. It may also contain a rule providing that

396 This increase of caseload would form a minor part of the ongoing overall institutional and budgetary discussion of the of the resources and responsibilities of the ECJ.

contract terms which restrict privacy rights are unfair and therefore non-binding on the consumer (in line with Article 8 of the Charter).
ENVIRONMENTAL IMPACTS This option would increase the use of transport. This would have an adverse impact upon the environment and would lead to an increase in CO2 and other vehicle emissions and would increase the cost to control pollution due to the binding EU rules.
SIMPLIFICATION POTENTIAL Compared to the BS this option would simplify the regulatory environment to a certain extent as a number of differences between the contract laws of MS would be eliminated. However, as MS would still have differing levels of implementation of the Directive, quite a number of differences between contract laws would remain.
ONLINE ENVIRONMENT If the Directive applied to an online cross border and domestic environment only, it would allow businesses performing B2B contracts to offer their products online and across the EU based on the same set of contract law rules. This would mean these businesses would not need to adapt their terms and conditions and IT platforms (the latter to a great degree) to trade in another country – this could provide an incentive to businesses to increase their online domestic and cross border trade. Compared to the BS, this option could help towards narrowing the gap between domestic and cross border online sales as businesses would be encouraged by the use of one contract to offer their products in more MS. However this would not be the case for businesses who perform B2C contracts and for them, the BS situation would largely remain the same. In addition, a Directive dedicated to cross border and domestic e-commerce only may lead to increased legal complexity. Companies using distribution channels other than e-commerce would have to apply different legal rules depending on the distribution channel they use. Furthermore, it would not be technologically neutral and thus may generate distortion of competition should new forms of distance sales occur in addition to e-commerce, for instance ‘mobile telephony commerce’. Such a solution could also create additional legal complexity for consumers who could be subject to different rules depending on whether they make a purchase online, at a distance using another method (i.e. post or telephone) or face-to-face.
IMPACT IF THIS OPTION IS APPLIED CROSS BORDER ONLY Although businesses using B2B contracts would be able to use one contract law for cross border trade with multiple MS and reduce transaction costs, the same would not be true for those businesses who perform B2C contracts as they would still need to research where MS have gone beyond the mandatory consumer protection rules set out in the Directive – thereby incurring transaction costs. In addition, the Directive would not comply with the proportionality principle as it would go beyond what is necessary to solve the problem. The Directive would replace all national contract laws in relation to cross border contracts. All exporting firms would *have* to use the Directive in their cross border contracts (rather than having a choice to). Those firms who are already exporting would mandatorily have to adapt their contracts to the new Directive – even if they have no desire to enter a new market - and incur once again the additional transaction costs. These transaction costs (€8.18 billion for all current exporters) above would apply to all exporting firms. In the Green Paper consultation, almost all MS responses to the Green Paper consultation rejected this option stressing that to solve the problem of differences in contract laws, this type of Directive was not consistent with principle of subsidiarity or proportionality.

OVERALL ASSESSMENT
Compared to the BS, this option would to a certain extent reduce transaction costs and increase the level of consumer protection. In the longer term, legal practitioners would benefit as they would experience an increase in demand by new clients who would need to understand the instrument for domestic and cross-border contracts. However, it could also lead to a loss of income for law firms in the area of provision of legal advice of a specific law if companies chose to obtain legal advice elsewhere. However, as set out in options 5a and 6, there would be a very substantial one off cost borne by all traders (both domestic and cross border) as they would have to adapt their contracts to use the new law. This cost would affect all companies, irrespective of their desire to trade cross-border. A cross border only scope would not be a proportionate solution as businesses who do not want to use it would have to adapt their contracts and incur transaction costs. In addition, due to the nature of minimum harmonisation, there would still be some extra costs for businesses when trading cross border to consumers, these would arise from the necessity to research the levels of consumer protection in other MS. Therefore, whilst there may be a worthwhile investment for B2B cross border transactions, those performing B2C cross border contracts as well as trading only domestically would have to pay very substantial additional costs without a clear added value. There would also be administrative costs which would arise from the need for businesses to comply with the Directive these costs would affect all companies. MS would be likely to find this option politically very difficult to agree and to implement as it would eliminate domestic laws and legal traditions. The majority of MS who responded to the Green Paper consultation rejected this option outright. Overall, although this option would minimally harmonise existing contract law legislation and civil codes and reduce transaction costs for some traders, it would add to the issues set out in the problem definition as some costs for researching the law would still remain. Therefore from a holistic perspective, taking all the costs (monetary or otherwise) into account these costs outweigh by far the benefits of the instrument.

6. Effectiveness of policy options in meeting policy objectives

6.1. Policy option 1: Baseline Scenario

Policy Objectives	**Effectiveness in meeting the objectives/addressing the problems**
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	The differences in national contract laws would remain, so would additional transaction costs for cross border trade.
Reduce legal complexity in cross-border trade	Companies would continue to deal with multiple national laws. In the absence of EU action, MS would be likely to continue to take initiatives in an uncoordinated manner (for example future implementation/transposition of contract law related concepts at the EU level would be different between MS). This would allow the legal complexity to further increase. However, the publication of the Expert Group work could facilitate some shared understanding of the commonalities between the EU legal systems (such a scenario has previously been demonstrated by the EP who have used the Draft Common Frame of Reference when making amendments to the CRD), but this would not occur in a coordinated and

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
	predictable manner. In addition, the work of the Expert Group could also be used by businesses when drafting their standard terms and conditions provided the rules developed by the Expert Group are not contradictory to the applicable law. Despite these possibilities, any convergence in national laws would appear in the long term as concepts to be agreed in future laws would take time to embed.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-border shopping	The BS includes the adoption of the CRD, which, due to its nature (full harmonisation) ensures that consumers have certain rights which are harmonised across the EU. However, a level of uncertainty would still exist as MS would be free to implement domestic legislation according to their own interpretations, this in turn would lead to some differences between the national laws. Because of these differences, in some cases consumers would be dissuaded from shopping cross-border.
Increased consumer protection	As set out above the adoption of the CRD ensures that consumers have certain rights which are harmonised across the EU. However there are some elements of consumer protection in contract law which are not covered by the CRD. With no EU action, these would remain.

6.2. Policy option 2

6.2.1. Policy option 2a: Toolbox as a Commission document

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	This option could go a little way towards meeting this objective as in the longer term there could be some minimal reduction in transaction costs due to the convergence of certain contract law concepts, but the extent of this is unknown as we cannot predict when and how these concepts would be used.
Reduce legal complexity in cross-border trade	In the longer term, there is likely to be a small convergence in national legislation in the area of contract law. This would mean fewer differences between the contract law legislation in a trader's country compared to the country they intended to trade with and effectively reduce the level of complexity in cross border trade. However, despite this small convergence, this option would not prevent some differences in future contract law concepts/rules. At the EU level, the co-legislators could depart from the toolbox by amending Commission proposals in negotiations. At MS level this option would not ensure that MS adopt identical rules as set out in the toolbox when implementing Union legislation. As differences among national laws resulting from the transposition of Directives cannot be avoided, in comparison to the BS legal complexity currently experienced by businesses would not decrease to a great extent.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-	Compared to the BS, there is likely to be a small convergence in the area of Common European Sales Law in the longer term. Because of this convergence, this option would provide for some, albeit rather limited, improved legal certainty with regards to future contract law concepts.

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
border shopping	
Increased consumer protection	Compared to the BS, this option would only go a very small way to meeting this objective as the impact would be limited and only felt when all three institutions use the toolbox concepts when passing EU contract law related legislation.

6.2.2. Policy option 2b: Toolbox as an inter-institutional agreement

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce legal complexity in cross-border trade	The same concepts set out in PO2a would apply here, however the use of an inter institutional agreement (IIA) would commit the institutions to use the toolbox as a basis for future contract law concepts; therefore, unless there was a justified reason not to, the institutions would always use the toolbox for future contract law related concepts. This would lead to a greater convergence and coherence in future EU legislation and a greater reduction in complexity for businesses. However despite this increased level of convergence, this option cannot fully prevent the existence of differences in national contract law concepts in the future. This is because if there were justified reasons for the Council and EP to depart from the IIA they would be able to. If this happened then differences in contract law concepts between the three Institutions (as highlighted in PO2a) would be created. As described in PO2a, differences in legislation between MS could also remain because this option would not ensure that MS adopt identical rules as set out in the toolbox when implementing Union legislation. In the longer term, reduction in legal complexity is likely to be of a greater magnitude than in the case of PO2a, but still limited compared to the BS.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-border shopping	In the longer term, this option is likely to lead to some convergence in the area of Common European Sales Law, and as a result would provide greater legal certainty for consumers with regards to future contract law concepts compared to PO2a. However, as described under the 'business objectives,' despite this convergence, this option is likely to only remedy the current problem to a small extent.
Increased consumer protection	This option would go a small way to meeting this objective as the impacts felt would be of a greater magnitude because all three institutions would use the toolbox concepts when passing EU legislation.

6.3. Policy option 3: Recommendation on a Common European Sales Law

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	Compared to the BS this option would only reduce transaction costs if MS who incorporate the Common European Sales Law entirely and without changes (scenario 2 under the relevant impact analysis). For B2C traders in MS who have not incorporated the Common European Sales Law as above, when trading with consumers from MS who have also not incorporated the Common European

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
	Sales Law, the differences in contract laws would remain and the BS transaction costs would still apply.
Reduce legal complexity in cross-border trade	As the Recommendation would not be legally binding, it would allow MS discretion on timing, method and extent of implementation. Therefore (unless many MS incorporate the Common European Sales Law at the same time, entirely and without changes as attached to the Recommendation) this option would allow for differences between contract laws of MS and the legal complexity experienced by traders would not change from the BS.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-border shopping	This option would not reduce the level of uncertainty that consumers experience about their rights as MS would have discretion on timing, method and extent of implementation thereby creating differences between the contract laws of MS. However, if many MS incorporated the Common European Sales Law at the same time, entirely and without changes as attached to the Recommendation then this option could also build confidence in consumers and increase their legal certainty as they would be subject to one similar core set of rules and would become familiar with a similar contract being used in their purchases which would not vary greatly between the MS who use it.
Increased consumer protection	Applicable to B2C contracts only and only where a MS has incorporated the provisions of the Common European Sales Law into its national laws. When compared to the BS, this option would meet this objective as the Common European Sales Law would provide for a high level of consumer protection (see annex VIII.).

6.4. Policy option 4: Regulation/Directive setting up an optional Common European Sales Law

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	Compared to the BS (for B2B and B2C) this option would reduce additional transaction costs for those businesses that choose to use the optional Common European Sales Law for cross border trade with more than 1 MS.
Reduce legal complexity in cross-border trade	This option would reduce the legal complexity as it would offer businesses the choice of using one legal system for cross border trade across the whole of the EU instead of the current twenty six.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-border shopping	This option would build confidence in consumers and increase their certainty about their rights as they would be subject to one similar core set of rules for when they purchase cross border from traders who use the optional Common European Sales Law.

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
Increased consumer protection	Applicable to B2C contracts only. This option would meet this objective as the optional Common European Sales Law would provide a high level of consumer protection. See annex VIII for more details.

6.5. Policy option 5 and policy option 6

6.6. Policy option 5a: Full harmonisation Directive on a mandatory Common European Sales Law and policy option 6: Regulation establishing a mandatory Common European Sales Law

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	Compared to the BS for B2B and B2C contracts, the instrument would meet this objective as it would eliminate transaction costs for those businesses that trade with more than 1 MS.
Reduce legal complexity in cross-border trade	The instrument would reduce legal complexity as the same system between the contract laws of the MS would exist.
CONSUMER OBJECTIVES	
Reduce level of uncertainty about consumer rights in cross-border shopping	The instrument would subject consumers to the same set of rules in their sales contracts across the EU. This would reduce the level of uncertainty consumers experience about their rights which in turn could increase their confidence when shopping cross border.
Increased consumer protection	Applicable to B2C contracts only. This objective would be met as the instrument would have a high level of consumer protection provisions (see Annex VIII for further details).

6.6.1. Policy option 5b: Minimum harmonisation Directive on a mandatory Common European Sales Law

Policy Objectives	Effectiveness in meeting the objectives/addressing the problems
BUSINESS OBJECTIVES	
Reduce transaction costs for cross-border trade	For B2B contracts this option would meet this objective. However for those traders who perform B2C contracts there would still be a necessity to research the mandatory consumer protection rules of a country as MS could transpose the Directive into their national laws beyond those rules which are minimally harmonised. Therefore transaction costs would remain.

Policy Objectives	**Effectiveness in meeting the objectives/addressing the problems**
Reduce legal complexity in cross-border trade	For B2B contracts this option would meet this objective. For B2C contracts there would be some reduction in legal complexity as a more consistent and convergent system between the contract laws of the MS would exist, however due to possible differences in consumer protection rules between MS, some legal complexity would remain.
CONSUMER OBJECTIVES	
Reduce uncertainty about consumer rights in cross-border shopping	This option would go some way towards meeting this objective as it would subject consumers to a more similar set of rules in their sales contracts. This would reduce the level of uncertainty consumers experience about their rights, which in turn could increase their confidence when shopping cross border.
Increased consumer protection	Applicable to B2C contracts only. This option would meet this objective as the Directive would have a high level of consumer protection provisions (see annex VIII for further details).

ANNEX VI: IMPACTS OF THE COMMON EUROPEAN SALES LAW ON FUNDAMENTAL RIGHTS

EU legislation must fully comply with the provisions of the EU Charter of Fundamental Rights, which has become legally binding following the entry into force of the Lisbon Treaty. All legislative proposals of the Commission are subject to a systematic check to ensure their compliance with the Charter.[397] This annex assesses in detail the impact on the relevant fundamental rights embodied in the Charter. They include: Article 38 on consumer protection, Article 16 on the freedom to conduct a business, Article 17 on the right to property, Article 21(2) on non-discrimination on the basis of nationality and Article 8 on data protection.

Irrespective of the legal form it may take, the Common European Sales Law instrument would not have a negative impact on any of the abovementioned rights and would facilitate the exercise particularly of the freedom to conduct a business and consumer protection. It would also have a positive impact on the right to property (by facilitating the disposal thereof) and to non-discrimination of consumers on the basis of nationality.

The scale of the positive impact on fundamental rights may vary and is in some way connected to the effectiveness of specific policy options in achieving the policy objectives, as stated above. As discussed in the section on comparison of policy options in the impact assessment report, the most effective options in achieving the business and consumer objectives are the optional Common European Sales Law (policy option - PO 4), the full harmonisation Directive on a mandatory Common European Sales Law (PO 5a) and a Regulation establishing a mandatory Common European Sales Law (PO 6). The least effective ones are the toolbox (PO 2) and Recommendation on a Common European Sales Law (PO 3b).

- ***Article 38 on consumer protection***[398]

The instrument of Common European Sales Law will contribute to ensuring a high level of consumer protection by the following means: Firstly, it will increase consumer protection in certain areas which are currently minimally harmonised (e.g. pre-contractual statements binding the seller, no hierarchy of sales remedies, increased warranty period). Secondly, it will create a high level of consumer protection in areas in which the Union has not previously acted (e.g. obligation of business to take back faulty products). Thirdly, it will take the fully harmonised provisions of the Consumer Rights Directive and the other minimum harmonisation provisions of the acquis as a benchmark.

A Common European Sales Law instrument, irrespective of the form, would have a positive impact on consumer protection, as it would ensure a high level of protection on a number of key consumer protection rules (examined in detail in Annex VIII). The positive impact of different policy options on consumer protection would differ, depending on the effect that the respective legal instruments would have on existing national laws.

The Recommendation introducing an optional Common European Sales Law (PO 3(b)) and a Regulation/ Directive introducing an optional Common European Sales Law (PO 4) would not deprive consumers of any rights they currently enjoy, as they would not replace or necessitate any changes in national laws. Therefore, consumers who wish to rely on their national law could continue to do so. Alternatively, those who are willing to accept an optional Common European Sales Law to govern their contracts could even gain more protection compared to their national law.

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397 Communication from the Commission Strategy on the effective implementation of the Charter, COM(2010) 573 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF

398 Union policies must ensure a high level of consumer protection. The Explanations clarify that this right is based on Article 169 TFEU, according to which "the Union shall contribute to protecting the … economic interests of consumers, as well as to promoting their right to information [and] education".

As illustrated by the analysis of impacts of key substantive consumer protection provisions (e.g. pre-contractual information, remedies for non-performance, burden of proof, damages) in Annex VIII, the level of protection ensured by the Common European Sales Law rules could overall be higher than the level of protection in most national laws of Member States.

On the other hand, the options of a full harmonisation Directive on a mandatory Common European Sales Law (PO 5a) and Regulation (PO 6) would replace national laws and could lead to changes to the level of protection consumers in certain Member States enjoy. While any Common European Sales Law instrument would ensure a high level of consumer protection, it would not be politically feasible to adopt an instrument which would take over all rules which ensure the highest level of protection out of the existing national laws of Member States. While the consumer would benefit from an increase in the protection for certain provisions, some consumers would be likely to lose protection in some specific cases compared to their existing national law. Therefore, the consumers in those Member States would lose protection for those selected provisions, as their national law would be changed. The same problem could occur in the case of a toolbox (PO 2), provided any of the rules it contains would be at a lower level than the respective rules in the national law of a given Member State.

- ***Article 16 on the freedom to conduct a business***

The instrument of Common European Sales Law would facilitate the exercise of the freedom to conduct business, in particular with regards to cross-border transactions in the EU. By creating a single set of contract law rules which businesses could choose to apply in transactions across the EU, it would remove obstacles for those companies which currently experience difficulties to conduct cross-border business. The instrument of Common European Sales Law contains no restrictions on the freedom of the parties to conclude contracts and to subject them to any applicable law.

The policy options of an optional Common European Sales Law (PO 4), a full harmonisation Directive (PO 5a) and a Regulation replacing national laws (PO 6) would be the most effective in facilitating the exercise of this right, particularly in a cross-border context. However, PO 5a and PO 6 would have the disadvantage of imposing costs on all (both domestic and exporting) companies (including those which are not interested in cross-border trade) in order to adapt to the changes in their national laws.

- ***Article 17 on the right to property***

The instrument of Common European Sales Law contains no restrictions on the freedom of the parties to exercise their property rights. Moreover, it can facilitate the exercise of this right as regards to the transfer of property by way of cross-border sales.

The policy options of an optional Common European Sales Law (PO 4), a full harmonisation Directive (PO 5a) and a Regulation (PO 6) would be most effective in facilitating the disposal of property by way of cross-border sales as they would introduce a set of uniform rules. While PO 5a and PO 6 would ensure that the same rules apply both domestically and cross-border, they would also have the disadvantage of generating costs for adaptations to the change in national law for those economic operators who are not interested in cross-border sales.

- ***Article 21(2) on non-discrimination on the basis of nationality***[399]

399 Article 21 of the Charter of Fundamental Rights does not create powers on the Union to enact anti-discrimination measures. It only addresses acts of discrimination by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaty. In particular, EU measures must not discriminate on the basis of nationality.

The instrument would not lead to discrimination, as it would apply across the EU without any distinction on the basis of nationality.[400] Moreover, the content of the instrument is likely to diminish indirect discrimination on grounds of nationality by private parties. More specifically, it would diminish the practice of refusal of cross-border sales to consumers in certain Member States. Consumers in countries such as Romania, Bulgaria, Latvia, Belgium, Malta, Ireland and Poland are particularly affected.[401] This will be achieved by removing objective contract-law related obstacles, which pose obstacles to cross-border transactions for businesses.

The policy options of an optional Common European Sales Law (PO 4), a full harmonisation Directive (PO 5a) and a Regulation replacing national laws (PO 6) would be the most effective in reducing the number of consumers who experience the refusal to sell. These options would effectively remove the contract law related barriers, which may be a reason for the traders to refuse cross-border sales.

- ***Article 8 on data protection***

The instrument of Common European Sales Law does not contain specific provisions on data protection. However, it may contain a rule providing that contract terms which restrict privacy rights are unfair and therefore non-binding on the consumer. In contractual relations, personal data may be affected to the extent that they have to be exchanged during the conclusion of a contract (name address, credit card details). Particularly in e-commerce situations personal data may be put at risk, as it could be used for instance for commercial purposes without the person's consent. However, specific rules of Directive 95/46 on Data Protection provide adequate protection concerning the use of this information.

400 The only exception is the option 3b (a Commission Recommendation) under which the application may be limited only to the Member States which will follow the Recommendation and could therefore use the instrument.

401 Communication on Cross-Border Business to Consumer e-Commerce in the EU, COM (2009) 557 final, 22.10.2009, p.6.

ANNEX VII: ADMINISTRATIVE COSTS

1. Identification and classification of obligations requirements

Contract law covers both pre-contractual and contractual information requirements. Legal obligations to provide information will mostly refer to B2C contracts. The consumer contract acquis consists of a number of Directives. They are mostly based on the principle of minimum harmonisation and Member States are allowed to introduce more stringent provisions including additional information requirements. There are also contract law related information requirements that are not regulated at the EU level.

The contract law related information requirements could be classified as **non-labelling information.**

2. Identification of required actions

The information requirement involves the following actions:

Table 1: Identification of required actions

Action	Applicability
1. Familiarising with information obligations	Yes
2. Training members and employees	No
3. Retrieving relevant information from existing data	No
4. Adjusting existing data	No
5. Producing new data	No
6. Designing information material	Yes
7. Filling in forms	No
8. Holding meetings	No
9. Inspecting and checking	No
10. Copying	Yes
11. Submitting information to the relevant actor	Yes
12. Filing the form	No
13. Buying equipment and supplies	No
14. Other	No

In order to meet the information requirement companies wishing to trade cross-border have to familiarise themselves with information requirements of the foreign law (action 1), adapt their general terms and conditions or other information materials accordingly and submit it to the other contractual party (actions 6, 10 and 11).

3. Classification by legal origin and impact of different options

- Option 1- (baseline scenario)- information requirements for B2B transactions are due to national law. In B2C, information requirements are due to national and EU law. The Commission in the impact assessment on the Consumer Rights Directive (CRD IA) estimated that 25% of administrative costs stem from national legislation and the rest is due to EU law. This estimate has been taken forward in this impact assessment for B2C transactions. In B2B transactions 100% of the administrative costs result from national law.

- Option 2a and 2b - no impact on administrative costs- a toolbox does not directly impose an information requirement.

- Option 3 –impact on administrative costs depending upon whether and to what extent a Member State decides to apply the Commission Recommendation.

- Option 4- impact on administrative costs. An optional Common European Sales Law will contain a set of information requirements. In addition, all traders choosing the optional Common European Sales Law will need to inform consumers about this fact. This would generate additional administrative costs (compared to the baseline assumptions) concerning designing information materials.

- Option 5a and 5b / Option 6

  - Option 5a (full harmonisation) and Option 6 (Regulation establishing a Common European Sales Law) – impact on administrative costs. These instruments will contain a set of information requirements. Traders would need to adapt to new information requirements.

  - Option 5 b (minimum harmonisation) - the same impacts as option 5a. However, if the Directive is based on minimum harmonisation, Member States will be able to go beyond the minimum information requirements and there would be additional costs for companies trading cross-border (the baseline administrative costs for exporters would remain unchanged).

4. Identification of target groups

The administrative costs will be borne by businesses. The costs do not differ between small, medium and large enterprises.

5 Identification of the frequency of required actions

Contract law related administrative costs are mostly one-off costs- e.g. there is no need to adapt the general terms and conditions or a website until a major reform of contract law.

- Option 1- one-off costs per entering a Member State. Costs borne by companies wishing to trade cross-border.

- Option 3- one-off costs for entering Member States that applied the Recommendation with national adjustments due to possible differences in the way Member States applied it.

- Option 4- only one set of one-off costs for entering all Member States. Costs borne by companies wishing to trade cross-border.

- Option 5 (a and b) and Option 6- one–off costs for all EU companies and under sub-option b (minimum harmonisation) the additional administrative costs for companies trading cross-border (the same as under the baseline scenario)

6 Identification of cost parameters

Option 1
As described in section 2.3.1 of the main report, a company wishing to trade cross-border needs to hire a lawyer who is an expert in the contract law of each relevant country. The lawyer will need to check the relevant national laws and the company will need to design the information material accordingly.

The baseline transaction costs in BC2 for trading with one other Member State amounts to €8,695-€9,565 and in B2B transaction €9,000-€10,568. These costs include administrative costs and other costs to familiarise and comply with other non-information related requirements.

The Commission in the CRD IA estimated the cost of legal validation of information requirements per Member State amount to €2,500 i.e. 10 hours of work billed at €250 per hour. In addition, the CRD IA considers other one-off cost elements such as designing information material, copying and submitting the information. These additional costs have been estimated at €1,026 for a distance seller and €2,125 for a doorstep seller. The total baseline administrative costs for a distance seller selling cross-border to one Member State amount to €3,526 and for a doorstep seller to €4,625.

These costs are likely to go down once the CRD has been adopted. The CRD foresees full harmonisation of the pre-contractual information requirements but other information related requirements e.g. a form in which information is to be provided are likely to remain fragmented. Therefore, exporters would still need to familiarise and comply with some national provisions concerning the information requirements. It could be assumed that the time needed for legal validation of information requirements as estimated in the CRD IA would be shorter but other required costs (e.g. designing information materials, copying and submitting the information) would remain unchanged after the adoption of the CRD. The scope of the Directive is also likely to be limited to distance and off-premises sales meaning that the adoption of the CRD will not have any impact on administrative costs for exporters who sell by other methods (i.e. on-premises sales) or those which stem from provisions of general contract law. Therefore, for this impact assessment the average administrative cost per company exporting are estimated at €2,500 (average for all sales channels – doorstep, distance and on-premises sales) that will remain after the adoption of the CRD. This means that the administrative costs amount to around 25% of the transactions costs as estimated in section 2.3.1 of the report.

Difference between administrative and transaction costs

EU consumer protection rules require companies to provide certain information to consumers before and after the conclusion of a contract. The information requirements cover, for example: identity of the supplier, the main characteristics of the product, the arrangements of payment etc. These obligations are however regulated differently between Member States. In some countries, information must be provided in writing or in a specific form. Member States have also introduced additional information obligations.

Administrative costs refer to all the costs associated with compliance with these information requirements while transactions costs are a broader concept covering all the aspects of contract law.

For example, companies need to investigate the national rules according to which remedies may be invoked or national lists of unfair contract terms. These requirements do not impose any information obligations (i.e. companies do not have to provide information on available sales remedies in the

contract or before conclusion of the contract). These costs are however part of the transaction costs for business wishing to trade cross-border.

In addition, specific IT costs may be relevant for businesses selling to consumers in other Member States via e-commerce. These additional costs stem from the need to adapt a business's internet platform to the legal requirements of each Member States it directs its activity to. They include costs for adapting the web-site so that it can recognise the consumer's country of residence and retrieve the correct set of pages.[402] These additional transaction costs have been estimated at €2,916 per Member State and they are related to providing information (action 6 – designing information material).

In B2B transactions, companies are not faced with such strict information requirements as in B2C contracts. The national law may however contain some provisions related to information requirements. It is assumed that the legal validation of information requirements in B2B transactions and other related actions will take less time than for B2C transactions. It has been roughly assumed that administrative costs would amount to 15% of transactions costs for B2B sales as estimated in section 2.3.1 of the report (compared to 25% in B2C transactions).

To simplify calculations, it is further assumed that these administrative costs are split equally across all the identified actions.

Option 3

The impacts of this option would very much be dependent upon:

- Whether and how many MS decide to incorporate an optional Common European Sales Law and to what extent.
- How many businesses decide to use the Common European Sales Law.

On a qualitative basis the impacts would reduce the baseline administrative costs to some degree only. For those MS who decide to incorporate the Common European Sales Law completely without any changes and at the same time, the differences between national cross border laws would cease (similarly to option 4 and 5). Therefore if traders used the Common European Sales Law they would only incur the one off administrative cost to become familiar and comply with the information requirements, but this cost would not be borne again if the trader wished to expand trade to another MS that incorporated the Common European Sales Law.

Option 4

It is assumed that the one-off cost of adaptation to the optional Common European Sales Law equals the baseline administrative cost per company for entering one Member State under the baseline scenario i.e. €2,500. This is considered as a high estimate since the costs are likely to be lower than under the baseline scenario e.g. a company would not need to advise an expert in international law which is often be the case under the baseline scenario but rather a local lawyer.

The additional administrative cost for option 4 in B2C contracts concerns the need to inform consumers about the choice of the optional Common European Sales Law. This cost will be borne by all companies. For example, companies trading via e-commerce[403] would need to create e.g. a pop window informing a consumer about the application of the European contract law and companies trading via post will need to add similar information in a brochure. This one-off cost is

402 Federation of Small Businesses (FSB) in the UK, Response to the Green Paper on policy options for progress towards a possible European contract law for consumers and businesses , p.3; see FSB Position Paper on Rome I, p.3 for detailed breakdown of costs.

403 It should be noted that under option 4, additional IT costs for companies trading via e-commerce would disappear as retailers would not be required to adapt their websites to recognise the consumer's country. They should use the same set of information for all the countries.

assumed to be around €500. Therefore the total one-off cost for a company using an optional Common European Sales Law would amount to €3,000.

Option 5 and Option 6

Option 5 a (full harmonisation Directive) and Option 6 (Regulation establishing a European contract law)
Similarly to option 4, it is assumed that the one-off cost of adaptation to the Directive/Regulation equals the baseline administrative cost per company for entering one Member State i.e. €2500. Similarly to option 4, this is considered as a high estimate since the costs are likely to be lower than under the baseline scenario e.g. a company would not need to seek advice from an expert in international law which is often be the case under the baseline scenario but rather a local lawyer.

Option 5 b (minimum harmonisation Directive)
The same impact as option 5a. However, if the Directive is based on minimum harmonisation, Member States will be able to go beyond the minimum information requirements. In this case the baseline administrative costs for companies trading cross-border will remain unchanged.

7. Assessment of the number of entities concerned

Option 1
In B2C transactions all the exporting companies will need to bear administrative costs. In B2B transactions, the costs will be borne by companies exporting and applying the law of the other contractual party.

Table 2: Number of companies affected in Option 1

	Number of firms exporting[404] (a)	Share of firms exporting under law of partner country [405] (b)	Number of firms exporting under law of partner country (c) c= a*b
Agriculture (B2B)	28,771	14.6%	4,200
Manufacturing and mining (B2B)	363,353	14.6%	53,050
Wholesale (B2B)	268,430	14.6%	39,190
Retail (B2C)	184,670	-	184,670
Total	845,224	n/a	281,110

The number of companies in B2C that will incur additional IT costs amounts to 67,230.[406]

The costs grow proportionally to the number of countries with which enterprises trade. The number of required actions has therefore been multiplied by 4 (the average between the low and high estimate of the average number of EU countries companies export to, both in B2B and B2C).[407]

It should be noted that for Option 1 the administrative costs are calculated for the firms currently active. Notably, these are mainly sunk one-off costs, sunk by EU businesses which already entered

404 See annex III.

405 Flash Eurobarometer 299, European contract law in business-to-business transactions, not published.

406 See annex III, Calculation of opportunity and transaction costs.

407 See annex III, Calculation of opportunity and transaction costs.

cross-border trade. On the other hand, more administrative costs for the EU economy occur annually, as the new EU exporters (estimated at 14.6% yearly)[408] pay transaction costs for entering cross-border trade.

Option 3

There are several variants of the incorporation of the Common European Sales Law under this option and its subsequent outcomes:

Scenario 1:

In the ideal scenario all MS would implement the Common European Sales Law completely, without changes and at the same time. There would be a one-off sunk cost for familiarisation of the Common European Sales Law when businesses first use it to trade with a business or consumer in one other MS. The impacts of this scenario would be the same as those listed under the analysis of impacts of policy option 4.

Scenario 2:

Some of the MS could decide to implement the Common European Sales Law completely, without changes and at the same time.

This scenario would be of benefit to traders who perform B2B contracts, because even where MS decided not to incorporate the Common European Sales Law, traders would have the freedom to decide on the law applicable to their contract (as the choice of using the law of a third country would still apply to them). This would mean that traders who performed B2B contracts would have the opportunity to reduce their administrative costs through the use of the Common European Sales Law (provided that at least 1 MS implemented the Recommendation) – even if their MS had not incorporated it. The same would be the case for B2C contracts, if both MS of the business' and the consumer's residence implemented the Common European Sales Law entirely and without changes. If not, scenario 3 would apply.

Scenario 3:

Some MS could decide to incorporate the Common European Sales Law not completely, with changes, not at the same time, or a combination of these factors.

Under this scenario, problems would arise similar to those set out under Scenario 2 and in some countries businesses would face higher administrative costs than in other countries. For B2B contracts the same situation as under scenario 2 would apply. For B2C contracts the situation would become even more complicated as businesses who wanted to use the Common European Sales Law could only approach and sell to consumers whose MS have incorporated the Recommendation and in doing so, businesses would have to research where MS have gone beyond the drafting of the Common European Sales Law with regards to mandatory consumer protection rules and where the level of domestic consumer protection is higher than that offered in the Common European Sales Law. However for those consumers whose MS have not implemented the Recommendation who approach a business in another country and want to use the Common European Sales Law, they would not be able to.[409]

Because of the piecemeal way in which the Common European Sales Law could be incorporated, it is difficult to estimate the precise number of companies potentially affected by additional administrative costs. The administrative costs are likely to remain on a similar level as under the baseline scenario.

408 The estimate of 14.6% does not take reflect that some of the new exporters may have already exported in the past and incurred the one-off transaction costs. However, this is partly balanced by the fact that this estimate does not include companies which already export and want to expand their operations to more EU countries. See annex III for further details.

409 See the main report, section 5.

Option 4

Option 4 is likely to affect the current exporters who would have the possibility to use the Common European Sales Law but also to encourage companies currently trading only domestically to extend their business cross-border.

- **Current exporters**

Companies wishing to trade cross-border would be able to choose optional Common European Sales Law and need to adapt their terms and conditions only once to trade with all EU countries. These are the companies that are affected by the baseline administrative costs (see table 2).

In the Eurobarometer surveys, 70% of the surveyed enterprises (B2B and B2C)[410] said that they would choose the jurisdiction of an EU contract law if it existed and this has been used as an assumption of the number of companies using the European contract law. However, considering that only a part of these respondents indicated an optional instrument as the preferred policy options (respectively 38% EB 320 (on B2B) and 37% in EB 321 (for B2C) this assumption is considered as a high estimate giving an indication of maximum costs to be borne by companies.

It could therefore be estimated that 156,272 companies currently exporting (129,626 in B2C and 26,643 in B2B) would use the optional instrument and would bear administrative costs.

Table 3: Number of exporters using optional instrument

	Number of firms affected by the baseline administrative costs[411] (a)	Share of firms likely to use Common European Sales Law(b)	Number of firms willing to use Common European Sales Law (c) = a*b
Agriculture (B2B)	4,200	70%	2,940
Manufacturing (B2B)	53,050	70%	37,135
Wholesale (B2B)	39,190	70%	27,433
Retail (B2C)	184,670	70%	129,629
Total	281,110		197,137

- **New exporters**

Option 4 is expected to encourage companies currently trading only domestically to extend their business cross-border.

<u>- B2C transactions</u>

The Eurobarometer survey found that 21% of retailers that do not make cross-border sales would expand their business across-borders if laws regulating transactions were the same across the EU.[412]

410EB 320 on European contract law in business-to-business transactions, 2011; EB 321 on European contract law in consumer transactions. 2011- companies likely or very ;likely to of use the European contract law in cross-border transactions for cross-border transactions.

411 See table 2.

412 Flash Eurobarometer 300. Business attitudes towards cross-border trade and consumer protection, p.25.

The sample of this Eurobarometer survey covers only companies of 10 employees and more. The study on Internalisation of SMEs shows that the bigger the company is the more likely it is to export. The share of exporters among micro enterprises amounts to 24% compared to 54% for medium size companies. It could be therefore assumed that the proportion of micro enterprises that would expand their business cross-border if an optional European contract law instrument was available would be 2,25 times lower than for larger companies i.e. 9.3%. Micro companies account for 95% of all retailers. It could be therefore estimated that 10% of all retailers would start cross-border operations under option 4.[413]

Based on above, it has been estimated that 442,056 companies who trade B2C and who are currently only trading domestically would expand their operations cross-border.

- <u>B2B transactions</u>

In B2B transactions companies are free to choose the applicable law. It is therefore assumed that a considerably smaller proportion i.e. 5% of companies involved in B2B transactions will extend their operation cross-border compared to 10% of companies involved in B2C transactions. For the agriculture sector where the number of companies currently exporting is marginal i.e. 0.29% the potential effect will be minimal and therefore this sector is not included in the estimates below.
Based on the above, it has been estimated that 173,229 companies in B2B who are currently only trading domestically would expand their operations cross-border (99,043 in the manufacturing sector and 74,186 in the wholesale sector).

Table 4: Number of new exporters using the optional Common European Sales Law

	Number of non exporters[414] (a)	Share of new exporters due to introduction of the Common European Sales Law (b)	Share of firms exporting under optional Common European Sales Law (c)	Number of new exporters exporting under optional Common European Sales Law(d) d=a*b*c
Manufacturing (B2B)	1,980,860	5%	100%	99,043
Wholesale (B2B)	1,483,724	5%	100%	74,186
Retail (B2C)	4,420,563	10%	100%	442,056
Total	7,885,147			615,285

Option 5

Full harmonisation Directive (option 5a) and Option 6

All firms including exporters and non- exporters will have to adapt contracts and the general terms and conditions.

Table 5: Number of companies affected in Option 5a and Option 6

	Number of firms[415]
Agriculture (B2B)	13,700,400
Manufacturing (B2B)	2,322,830

413 (95% of micro companies *8.4% + 5% (larger companies) x21%=9.99%.

414 See annex III, Calculation of opportunity and transaction costs.

415 See annex III, Calculation of opportunity and transaction costs.

Wholesale (B2B)	1,752,155
Retail (B2C)	4,605,233
Total	22,402,000

Minimum harmonisation Directive (option 5b)

All firms including non-exporters will have to adapt contracts and the general terms and conditions.

As this option is based on minimum harmonisation, the impact on administrative costs for current exporters will be minimal compared to the baseline scenario. Companies will need to familiarise themselves with national laws transposing the Directive and adapt their contracts accordingly. The administrative costs for companies trading cross-border will remain unchanged compared to the baseline.

8. Summary of estimates

B2C transactions

The table below shows the comparison of administrative costs of different options. The baseline administrative cost per company amount to €10,000.[416]The average administrative cost per company are the lowest under option 5 and 6 (€2,500) but this option is likely to impact many more companies than option 4 so the total administrative burden for the companies is much higher.

Table 6: Comparison of administrative costs in B2C transactions

	No of companies affected (a)	Average one-off cost per company (b)	Total administrative costs (in millions €)[417] c=a*b
Option 1(baseline) E-commerce (additional costs) **Total cost**	184,670[418] 67,230	€10,000[419] €11,664[420]	1,847 784 **2,631**
Option 4	571,685[421]	€3,000	**1,715**
Option 5a (full harmonisation) and Option 6	4,605,233[422]	€2,500	**11,513**
Option 5b (minimum harmonisation) All companies Exporters (additional costs- as in the	 4,605,233 184, 670	 €2,500 €10,000	 11,513 1,847

416 The baseline administrative cost per company per MS €2,500 * 4 the average number of EU countries companies export to.

417 See also the SCM spreadsheets with administrative costs calculations.

418 This number covers all current exporters. The annual administrative costs for the EU economy can be estimated based on the percentage of new exporters within the EU on a yearly basis, estimated at 15%. See table 2, column c.

419 €2,500 (the baseline administrative cost per company per MS)* 4 (the average number of EU countries companies export to).

420 €2,916 (the baseline additional administrative costs in e-commerce)* 4 (the average number of EU countries companies export to).

421 This number covers all the retailers that are likely to use an optional instrument: current exporters (129,619 –see table 3 column d) and new-exporters that will only expand their operations cross-border as the result of a new legal framework (442,056 – see .table 4 column d). This effect will not be immediate and is likely to take a number of years.

422 See table 5.

baseline) Total costs	67,230	€11,664	784 **14,144**

Option 4, option 5 and option 6 are likely to contribute to cost savings for companies trading to more than 1 MS compared to the baseline scenario. These savings grow proportionally to the number of Member States a company trades to. For example, if a company trades to 2 MS the cost saving of option 4 would amount to €1,500 and €2,500 under option 5 and 6. If a company trades in the whole EU, the cost saving per company under option 4 would amount to €62,000 and to €62,500 under option 5.

Table 7: Comparison of administrative costs per company in B2C transactions

	Option 1 (baseline)	Option 4	Option 5
Domestic traders only	0	0	€2,500
Trading with 1 MS	€2,500	€3,000	€2,500
Trading with 2 MS	€5,000	€3,000	€2,500
Trading with 3 MS	€7,500	€3,000	€2,500
Trading with 4 MS	€10,000	€3,000	€2,500
Trading with 26 MS (whole EU)	€65,000	€3,000	€2,500

B2B transactions

The table below shows the comparison of administrative costs of the different options. The baseline administrative cost per company amount to €6,000. The average administrative cost per company are the lowest under option 4, 5 and 6. However, option 5 and option 6 are likely to impact many more companies than option 4 so the total administrative burden for the companies is much higher.

Table 8: Comparison of administrative costs in B2B transactions

	No of companies affected (a)	Average cost per company (b)	Total administrative costs (in millions €)[423] c=a*b
Option 1 (baseline)	96,440[424]	€6,000[425]	579
Option 4	240,737[426]	€1,500	361
Option 5a (full harmonisation) and Option 6	17,775,385[427]	€1,500	26,695
Option 5b (minimum harmonisation)			
All companies	17,775,385	€1,500	26,695
Exporters (additional costs- as in the baseline)	96,440	€6,000	579
Total costs			**27,274**

Option 4, option 5 and option 6 are likely to contribute to cost savings for companies trading to more than 1 MS compared to the baseline scenario. These savings grow proportionally to the number of Member States a company trades to. For example, if a company trades to 2 MS the cost saving of option 4, 5 and 6 would amount to €1,500. If a company trades in the whole EU, the cost saving per company under option 4, 5 and 6would amount to €37,500.

Table 9: Comparison of administrative costs per company in B2B transactions

	Option 1 (baseline)	Option 4	Option 5
Domestic traders only	0	0	1,500
Trading with 1 MS	€1,500	1,500	1,500
Trading with 2 MS	€3,000	1,500	1,500
Trading with 3 MS	€4,500	1,500	1,500
Trading with 4 MS	€6,000	1,500	1,500
Trading with 26 MS (whole EU)	€39,000	1,500	1,500

423 See also the SCM spreadsheets with administrative costs calculations.

424 See table d, column c (4,200+53,050+39,190).

425 €1,500 (the baseline administrative cost per company per MS)* 4 (the average number of EU countries companies export to).

426This number covers all the retailers that are likely to use an optional instrument: current exporters (2940+37135+27433–see table 3, column d) and new-exporters that will only expand their operations cross-border as the result of a new legal framework (99,043+74,186– see .table 4 column d). This effect will not be immediate and is likely to take a number of years.

427 See table 5. Total number of companies in B2B sector = 13,700, 400 (agriculture) + 2,322,830 (manufacturing) + 1,752,155 (wholesale).

Option 1: Administrative costs B2C transactions

Insert here the name and reference of the regulatory act assessed / If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions x 4MS	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)		
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	
1			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		25%	OK
3			Non labelling information for third parties	Copying	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		25%	OK
4			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		25%	OK
6			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		25%	OK
14			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting via e-commerce			2916	1	67.230	268.920			784.170.720	1	0		25%	OK
																		657.717.680	

Total administrative costs (€)	**2.630.870.720**
Total administrative burden (€)	2.630.870.720
Administrative costs by origin (€)	0
Average cost per company	10.000
Average cost per company per MS	2.500
Average cost for a company exporting via e-commerce	12.916

Option 1: Administrative costs B2B transactions

Insert here the name and reference of the regulatory act assessed / If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions x 4 MS	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
3			Non labelling information for third parties	Copying	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
4			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
6			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
																		144.660.000	433.980.000		

Total administrative costs (€)	**578.640.000**
Total administrative burden (€)	578.640.000
Average cost per company	6.000
Average cost per company per MS	1.500

Option 4: Administrative costs B2C transactions

Insert here the name and reference of the regulatory act assessed / If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	150	625	1	571.685	571685			357303125	1	0		100%			OK
3			Non labelling information for third parties	Copying	Companies exporting	250	150	625	1	571.685	571685			357303125	1	0		100%			OK
4			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	150	625	1	571.685	571685			357303125	1	0		100%			OK
6			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting	250	150	625	1	571.685	571685			357303125	1	0		100%			OK
14		infroomation about the choice of ECL	Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting			500	1	571.685	571685			285842500	1	0		100%			OK
																		1.715.055.000	0		

Total administrative costs (€)	**1.715.055.000**
Total administrative burden (€)	1.715.055.000
Administrative costs by origin (€)	0
Average cost per company	3.000
Average cost per company per MS	n/a

Option 4: Administrative costs B2B transactions

Insert here the name and reference of the regulatory act assessed If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	90	375	1	240737	240737			90276375	1	0		100%	0%		OK
3			Non labelling information for third parties	Copying	Companies exporting	250	90	375	1	240737	240737			90276375	1	0		100%	0%		OK
4			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	90	375	1	240737	240737			90276375	1	0		100%	0%		OK
6			Non labelling information for third parties	Designing information material (leaflet conception...)	Companies exporting	250	90	375	1	240737	240737			90276375	1	0		100%	0%		OK

Total administrative costs (€)	**361.105.500**
Total administrative burden (€)	361.105.500
Administrative costs by origin (€)	0
Average cost per company	1.500
Average cost per company per MS	n/a

Option 5 a (full harmonisation) : Administrative costs B2C transactions

Insert here the name and reference of the regulatory act assessed If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
3			Non labelling information for third parties	Copying	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
4			Non labelling information for third parties	Submitting information to the relevant actor	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
6			Non labelling information for third parties	Designing information material (leaflet conception...)	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
																		11.513.082.500	0		

Total administrative costs (€)	**11.513.082.500**
Total administrative burden (€)	11.513.082.500
Administrative costs by origin (€)	11.513.082.500
Average cost per company	2.500

Option 5 a (full harmonisattion): Administrative costs B2B transactions

Insert here the name and reference of the regulatory act assessed If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	all companies	250	90	375	1	17796767	17796767			6673787625	1	0		100%	0%		OK
3			Non labelling information for third parties	Copying	all companies	250	90	375	1	17796767	17796767			6673787625	1	0		100%	0%		OK
4			Non labelling information for third parties	Submitting information to the relevant actor	all companies	250	90	375	1	17796767	17796767			6673787625	1	0		100%	0%		OK
6			Non labelling information for third parties	Designing information material (leaflet conception...)	all companies	250	90	375	1	17796767	17796767			6673787625	1	0		100%	0%		OK

Total administrative costs (€)	**26.695.150.500**
Total administrative burden (€)	26.695.150.500
Administrative costs by origin (€)	26.695.150.500
Average cost per company	1.500
Average cost per company per MS	n/a

Option 5 b (minimum harmonisation): Administrative costs B2C transactions

Insert here the name and reference of the regulatory act assessed If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
3			Non labelling information for third parties	Copying	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
4			Non labelling information for third parties	Submitting information to the relevant actor	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
6			Non labelling information for third parties	Designing information material (leaflet conception…)	all companies	250	150	625	1	4.605.233	4605233			2878270625	1	0		100%			OK
8			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		100%			OK
9			Non labelling information for third parties	Copying	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		100%			OK
11			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		100%			OK
12			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting	250	150	625	1	184.670	738.680			461.675.000	1	0		100%			OK
14			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting via e-commerce			2916	1	67.230	268.920			784.170.720	1	0		100%			OK
																		############	0		

Total administrative costs (€)	**14.143.953.220**
Total administrative burden (€)	14.143.953.220
Administrative costs by origin (€)	14.143.953.220
Average cost per company trading domestcially	2.500
Averega cost per company expoerting	10.000

Option 5b minimum harmonisation)): Administrative costs B2B transactions

Insert here the name and reference of the regulatory act assessed If the act assessed is the transposition of one or several acts adopted at another level, insert here the name and reference of that or these 'original' acts						Tariff (€ per hour)	TIme (minutes)	Price (per action)	Freq (per entry) - ONE OFF COSTS	Nbr of entities	Total number of actions	Equipment costs (per entity & per year)	Outsourcing costs (per entity & per year)	Total Administrative Costs	Business As Usual Costs (% of AC)	Total Administrative Burdens (AC - BAU)	Regulatory origin (%)				
No.	Art.	Orig. Art.	Type of obligation	Description of required action(s)													Int	EU	Nat	Reg	
1			Non labelling information for third parties	Familiarising with the information obligation	all companies	250	90	375	1	17775385	17775385			6665769375	1	0		100%	0%		OK
3			Non labelling information for third parties	Copying	all companies	250	90	375	1	17775385	17775385			6665769375	1	0		100%	0%		OK
4			Non labelling information for third parties	Submitting information to the relevant actor	all companies	250	90	375	1	17775385	17775385			6665769375	1	0		100%	0%		OK
6			Non labelling information for third parties	Designing information material (leaflet conception…)	all companies	250	90	375	1	17775385	17775385			6665769375	1	0		100%	0%		OK
8			Non labelling information for third parties	Familiarising with the information obligation	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
10			Non labelling information for third parties	Copying	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
12			Non labelling information for third parties	Submitting information to the relevant actor	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK
14			Non labelling information for third parties	Designing information material (leaflet conception…)	Companies exporting	250	90	375	1	96.440	385760			144660000	1	0		25%	75%		OK

Total administrative costs (€)	**27.241.717.500**
Total administrative burden (€)	27.241.717.500
Administrative costs by origin (€)	27.241.717.500
Average cost per company trading domestically	1.500
Average cost per company exporting	6.000

ANNEX VIII: ANALYSIS OF IMPACTS OF MAJOR SUBSTANTIVE PROVISIONS OF A COMMON EUROPEAN SALES LAW

METHODOLOGY

A Common European Sales Law would comprise of a number of provisions, however, not each provision is likely to have a direct impact of the same magnitude on stakeholders. There are some rules, for instance the consumer protection provisions, which have received particular attention by both businesses and consumer stakeholders. For example, business representatives have pointed out that a Common European Sales Law should have a balanced level of consumer protection,[428] and consumer representatives have insisted that any new regulatory or non-regulatory tool in the field of consumer policy should have a clear added value for consumers.[429]

Quite a number of the provisions arise from the existing EU acquis or the the Consumer Rights Directive (CRD) which has been recently adopted. As a result, these provisions would have to be integrated and have already been impact assessed.

For the purpose of this impact assessment report a number of provisions have been selected for a detailed impact analysis. They include the rules which could be potentially burdensome on business or important for consumer confidence. They exclude provisions arising from existing EU acquis or the CRD. For each of the former provisions, the legal comparison and the assessment of impacts are carried out.

Legal analysis

The legal comparison sets out the draft provisions of a Common European Sales Law and compares it to the level of protection provided in the legal systems of a representative selection of Member States. It concludes with the impact such a provision would have on the level of protection in these Member States.

The sample of Member States (for most of the provisions) include: Austria, Belgium, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain and United Kingdom. This selection ensures a good geographical coverage (representation of EU15 and EU12 Member States) as well as coverage of different legal systems and traditions.

Assessment of impacts

For each provision the costs and benefits for the main stakeholders groups i.e. consumers and businesses are analysed.[430] These analyses are mostly of a qualitative nature. However, where reliable assumptions could be made and there was enough reliable information, the impacts are also monetised.

428 See for instance responses to the European Commission Green Paper consultation on Policy Options towards a European contract law for consumer and businesses by: Eurocommerce, p.4; Emota, p.2; UEAPME, p.3

429 See for instance response to the European Commission Green Paper consultation on Policy Options towards a European contract law for consumer and businesses by BEUC, p.9

430 These analyses are mostly of a qualitative nature. However, where reliable assumptions could be made and there was enough reliable information, the impacts are also monetised.

B2C TRANSACTIONS
Pre-contractual information:
Remedies for breach of information duty

Issue:

In the existing consumer acquis, there is only an obligation imposed on Member States to ensure adequate and effective means exist to ensure compliance with the pre-contractual requirements provided by Directives in the interests of consumers. For example Art. 11 (1) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. This Directive also states that where the business does not provide pre-contractual information to the consumer, then the withdrawal period of seven days is extended. However, the *acquis* does not provide any right for damages.

A Common European Sales Law would introduce the following additional remedies in case of breach of pre-contractual information duties (if there was no information provided or the information provided was not correct): Where the business has not fulfilled his pre-contractual information duty and, as result a contract has been concluded which the other party would not have concluded, or would not have concluded on the same terms, the business would be liable for damages. This would be a mandatory rule for B2C contracts.
- Where the business has not fulfilled his pre-contractual information duty and a contract has been concluded, the other party may, under certain conditions, avoid the contract under the 'mistake' or 'fraud' provisions.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
BE	- Distance contracts: The Belgian Act of 6 April 2010 on Market Practices and Consumer Protection contains most of the national provisions implementing EU consumer contract law directives, does not provide for a specific right to damages or a right to enforce the obligation. It has been defended that a consumer who does not exercise his right of withdrawal can claim damages for any loss incurred by the omission of the information on the basis of the general Art. 1382 Civil Code on extra-contractual liability. No case law is known. - Off-Premises contracts: Off-premises sales contracts must mandatorily be in writing. The absence of a written contract leads to the nullity of the contract. It is disputed whether this nullity is of public order (in which case it has to be raised ex officio by the judge). Normally courts do not recognise a right for the trader to claim any compensation in case of nullity of the off- premises sales contract (except where the consumer acted in bad faith). Like for distance contracts it would seem that the consumer in an off-premises contract would also have the right to claim damages under tort law for any loss caused by the absence of the information. - In Belgian law it is generally accepted that a contract is concluded on the basis of the expressed will of the parties rather than on their intended will. Thus where a party could legitimately rely on the other party's declaration, that declaration will prevail over the real will of that party and the parties will be deemed to have agreed on that basis.	+

DE	- Damages follow from §§ 280, 311 (1), 241 (2) BGB.	=
EE	- In the breach of information duties the consumer will have a right to damages under general information duties rule (no special regulation).	=
ES	- Distance sales: Administrative sanctions for breach of obligations regarding information and documentation [Sections 49.2.b) and 50.2 Act 1/2007, of 16th November, that passes the codified text of the General Law for the Defence of Consumers and Users and other complementary laws, henceforth TRLGDCU]. Reference to the TRLGDCU general provisions for B2C contracts and the Spanish Civil Code general contractual provisions: → TRLGDCU: There are no special provisions on damages regarding breach of information duties. According to Section 65, consumers' contracts that do not include relevant pre-contractual information will be completed in favour of consumers, according to the good faith principle. → Civil Code: There are no special provisions on damages regarding breach of information duties. Consumers will have a right to damages based on pre-contractual liability or culpa in contrahendo (Sections 7.1, and 1902 of the Civil Code). Contracts in which the failure to provide information amounts to –essential- mistake (error esencial) or fraud (dolo omisivo o reticencia dolosa), the lack of information can make the contract void (Sections 1266, 1269, 1270, and 1300 and ff. of the Civil Code), and can eventually also lead to damages. In cases of fraud (including for lack of information) case law of the Spanish Supreme Court allows the innocent party to use the remedies in the contract (essentially full damages and/or rescission, but there has been one case in which specific performance was granted) instead of avoidance and the accompanying damages. - Doorstep/off-premises sales: Consumers will have a right to damages based on precontractual liability or culpa in contrahendo (Sections 7.1 and 1902 of the Civil Code). Contracts can be made void (Art. 112 TRLGDCU) if consumers have not been informed about their right to withdraw from them (Sections 69 and 111 TRLGDCU).	=
FI	- Consumers may have the right to damages if there is a breach of pre-contractual information duties. Right to remedies is not automatic but depends on how essential the breach has been. These are general principles which apply for all kind of (consumer) contracts. - Consumer Protection Act Chapter Section 20 — Failure to provide information (1072/2000): (1) If the door-to-door selling document or the confirmation (…) has not been supplied to the consumer, the contract shall not be binding on him/her. If the consumer wishes to invoke this remedy, he shall notify the business within one year of the conclusion of the contract. (2) If the business supplies the door-to-door selling document or the confirmation before the consumer has invoked the non-bindingness of the contract, the consumer shall be entitled to withdraw from the contract, in door-to-door selling … and in distance selling … as from the receipt of the document or the confirmation. (3) If the contract lapses owing to the consumer having invoked its non-bindingness, the business shall without delay and in any event within 30 days of the notification refund the payments received and compensate the consumer for the costs of returning the goods or other performances.	=

FR	The pre-contractual information duties for doorstep and off-premises sales are provided by Art. L. 121-18 of the consumer code. Distance sales are dealt with in Art. L. 121-18 of the consumer code. No specific remedies are provided by French law more than the Directives allow. However application of general rules about damages and interpretation would lead to the same remedies mentioned above in the introductory paragraph.	=
HU	- Regarding distance contracts, there are no specific remedies providing for damages for the non-compliance with the information requirements (see: Arts. (3) and (4) of the Government Decree of 17/1999 on distance contracts. - Regarding off-premises contracts, under Art. 3 (1) of the Government Decree of 213/2008 on off-premises contracts if the seller does not fulfil its information duties the contract shall be null and void.	+
IT	- There are no special provisions on damages regarding breach of information duties, but the general provisions on damages apply. (Arts. 1337, 1218 of the Civil Code; see also, Cass. S.U. 26724/07).	=
LU	- Distance contracts: In the absence of confirmation of the imposed pre-contractual information duties (latest at the delivery of the goods or supply of services), the withdrawal right is extended by a further 3 months (Art. L. 222-5 Code Consommation). - Off-premises: If the consumer has not been properly informed in writing about his/her withdrawal right, the contract is void and this avoidance may be invoked by the consumer whatever the time lapsed since delivery of the goods or execution of the service (Art. 10 loi concernant le colportage, la vente ambulante, l'étalage de marchandises et la sollicitation de commandes).	+
NL	- Under current Dutch law there would be liability in damages only in the cases where the failure to provide the information would amount to an unfair commercial practice (see Art. 6:193j BW) or to a common tort, where fault would have to be established (6:162 BW).	+
PL	- There is no special provision on damages regarding breach of information duties, but the general provisions on damages (Arts. 471 and 415 of the Civil Code) would apply.	=
PT	Same protection regarding the right to damages.	=
RO	In Romanian consumers protection legislation, failure to inform the consumer prior to the conclusion of a distance agreement, insofar as it concerns certain specific matters (e.g. the essential characteristics of the product/service/tariff, consumer's right to have the agreement terminated for convenience, price) constitutes a minor offence and is sanctioned by an administrative fine ranging between (approx.) €250 and €1,000. No right to damages is expressly conveyed to the consumer under the specific legislation for cases where business defaults on its information duties. However, where it may be proven that damage has been caused, the consumers may obtain proper reparation based on the Romanian Civil Code provisions relating to tort. If the business fails to inform the consumer of his/her right to terminate the agreement for convenience, or such information is incomplete or mistakenly transmitted, the consumer's right to terminate the agreement for convenience is extended from 7-10 days to 60-90 days.	=
UK	- No provisions on damages.	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Pre-contractual information requirements are one of the most important instruments for consumer protection. However at present, in a number of Member States, companies are not liable for damages if a consumer concludes a contract as a result of the incorrect information or in the absence of information (e.g. BE, HU, LU, UK). Consumers could under certain conditions also avoid the contract under the 'mistake' or 'fraud' provisions (see section 2.2 and 2.3). Consumers would benefit from receiving more accurate information which would enable them to take well informed purchasing decisions.
Costs and benefits for businesses	
Costs for businesses	Businesses would be liable for information requirements and damages if they fail to provide information or provide incorrect information. The additional costs related to any potential claims for damages would affect traders who do not currently fulfill their obligations to provide full or correct pre- contractual information to consumers. In many Member States, the general provisions regarding the rights to damages already apply (e.g. DE, ES, EE, FI, FR, IT, PL, PT, RO). In these countries, the Common European Sales Law would confirm or further clarify these obligations but not create any additional obligations.
Benefits for businesses	Businesses would benefit from clearer rules and increased consumer confidence.

Duty to ensure information supplied is correct

Issue:

In addition to the general duty to disclose information about goods and services, a Common European Sales Law could introduce a duty for the party who supplies information before or at the time a contract is made, to take reasonable care to ensure that the information supplied is correct and is not misleading. In case of breach of this duty the aggrieved party has the remedies for breach of information duties (see point 2.1.1 above).

Country	Provision comparison	Impact on the level of consumer protection
BE	- Art. 4 of the Law of 6 April 2010 on Market Practices and Consumer Protection (MPCPA[431]) contains a general information duty of businesses vis-à-vis consumers: at the latest at the moment of convening the contract, the business shall give in good faith the consumer appropriate and useful information with regards to the most important characteristics of the product and concerning the sale conditions, taking into account the need for information expressed by the consumer and taking into account the expressed use or the reasonable foreseeable use by the consumer.	=

431 Law of 6 April 2010 concerning 'market practices' and consumer protection, BS 12 April 2010.

	- Under general contract law giving incorrect or misleading information is considered fraud ('vice du consentement'; 1116 Civil Code). Four conditions must be fulfilled: (1) the use of artifices; (2) the fraud must be committed by the other contracting party; (3) the party that commits fraud must have the intention to deceive or to mislead the other party and finally (4) the fraud must be of an overriding importance. Only if the latter condition is fulfilled, will fraud ('principal fraud') lead to the avoidance of the contract (at the request of the party that is victim of the fraud). If the fraud is not of an overriding importance and has not led the other party to enter into the contract (but could have led him or her only to enter into the contract under different conditions, e.g. a lower price) the fraud is 'incidental'. In the latter case, only damages can be claimed on the basis of a pre-contractual fault (tort liability: Art. 1382 of the Civil Code). The first condition (artifices) will be fulfilled: 1) If the information provided is incorrect, incomplete or misleading, (through lies, misleading declarations or overstatements); or 2) If there is an omission to provide information; in this case fraud will only be accepted if there is a special duty to inform and if the contracting party deliberately conceals this information. This special duty to speak can come forth of special legislation (e.g. Art. 4 MPCPA). Thus, in B2C situations it is also very likely that an omission to give information can constitute fraud. - All violations of the MPCPA, can give rise to an action for injunctive relief, although in the case of Art. 4 that sanction does not seem to be obvious. In addition, violation in bad faith of that provision is a criminal offense (fines: €500-€20000). In many cases of violation of Art. 4 MPCPA the consumer will have the possibility to rely on the remedies of general contract law: pre-contractual liability (culpa in contrahendo: Art. 1382-1383 of the Civil Code (damages)) and the sanction of avoidance for a defect of consent (mistake or fraud). But no right to enforce an obligation on which the consumer reasonably believed was due to the breach of information duty.	+ Regarding remedies
EE[432]	Estonian Law of Obligations Act (1.07.2002) provides (§ 14. Pre-contractual negotiations): Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate. There are no special remedies provided for in the Art. itself, but all remedies mentioned above are available (LOA § 101 (1)).	=
ES	No similar provision exists in Act 1/2007, of 16th November, that passes the codified text of the General Law for the Defence of Consumers and Users and other complementary laws (TRLGDCU). Nevertheless, Section 60 TRLGDCU establishes that, before a contract is made, businesses must give relevant, truthful and sufficient information about the main features of the contract to consumers (see the same provision in Section 97 TRLGDCU for distance contracts). The general remedies in Spanish Contract Law (TRLGDCU) would be available and are roughly similar.	Slightly +
FI	No such duty in Finnish law. But if the party supplies wrong information and the goods do not correspond to that information, the goods are defective (Consumer Protection Act, Chapter 5, Section 13).	+

432 ESTONIA: The responses are based on the Law of Obligations Act (LOA, 2002) which contains all relevant mandatory provisions for B2C and B2B contracts, General Part of Civil Code Act (2002) and Consumer Protection Act (1995).

IT	There is no such provision under Italian law. The Italian Consumer Code however has extended the meaning of unfair commercial practises also to misleading negotiation practises (Art. 21-23 Consumer Code). According to Art. 20 of the Consumer Code, the victim of misleading information is entitled to claim for damages under general rules on torts (Art. 2043 of the Civil Code).	= for the duty + for remedies
LU	The business' obligation not to supply false or misleading information derives from the implementation of the UCPD (Code de la consommation L.122-2). Consumer may invoke avoidance of any contract clause(s) which infringe L.122-2 – see L. 122-8 (2) of the Consumer Code.	= for the duty + for remedies
PL	There is no such special provision and no such remedies under Polish Law.	+
PT	- In general: Art. 227 para 1 of the Civil Code which provide a general duty of good faith in pre-contractual relations, from which the courts derive a duty to ensure the information is not misleading. Art. 8, para 1, of the Consumer Protection Act (CPA – Law 23/96, from the 31st July 1996), provides the same rule. - The remedies in general are damages; in contracts with consumers, there can also be the possibility for the consumer to withdraw from the contract; but no right to enforce an obligation on which the consumer reasonably believed was due to the breach of the information duty.	= + for remedies
UK	**England and Wales:** The rules governing misrepresentation, including Misrepresentation Act 1967, s 2(1) apply in principle only where there has been a misstatement of fact, but the courts are ready to find that a statement that literally may be true but which is misleading amounts to a false statement. Right to avoid if misrepresentation is serious; right to damages unless the person giving incorrect information shows that they had reasonable grounds for belief. **Scotland:** No such duty is directly imposed in Scottish law. However, there will often be remedies via the rules on error or damages for fraud or negligent misrepresentation. Also information may have to be given to avoid liability for non-conformity.	Slightly +

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Information requirements are one of the most important instruments for consumer protection. Proper information about goods and services enable consumers to make an informed purchasing decision and facilitate product comparison. Consumers are only enabled to do this if the information on goods and services provided to them is correct and not misleading. In the case of a breach of information obligations, consumers would benefit from remedies (see assessment in point 2.1.3)
Costs and benefits for businesses	
Costs for businesses	Businesses would have some additional costs to ensure that the information supplied is correct and is not misleading. However, these costs are considered as minor as the

	required standard would correspond to normal business practice. In many Member States, the rules on available remedies in the case of a breach of information requirements are less protective (e.g. PT, UK, LU, IT, ES, BE) and businesses might incur some additional costs if consumers make use of these remedies (see assessment in point 2.1.3)
Benefits for businesses	Businesses would benefit from increased consumer confidence and from more clear rules concerning their rights and obligations.

Mistake

Issue:

In the existing consumer acquis there are no contract law rules on a mistake and its consequences.

A Common European Sales Law would introduce a right of each party to avoid a contract for a mistake if the party, but for the mistake, would not have concluded the contract and if the other party: (1) caused the mistake; or (2) knew or could be expected to have known of the mistake and caused the contract to be concluded under a mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required the party aware of the mistake to point it out; or (3) caused the contract to be concluded in mistake by failing to comply with his pre-contractual information duty; or (4) made the same mistake.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
AT	§ 871 (1) ABGB: Avoidance if the mistake is fundamental and caused by the other party or the other party should have been aware according to circumstances. No particular reference to good faith and fair dealing. There is also a right of avoidance if the other party made the same mistake, but no black letter rule.	=
DE	Broader right of avoidance under § 119 BGB (insofar one could say better protection in German law).	-
EE	Same as in the General Part of Civil Code Act § 92.	=
ES	Under Section 1266 of the Civil Code, 'for error to invalidate consent, it must be about the substance of the thing which constituted the subject matter of the contract, or about the conditions thereof which should have been the main reason to enter into it. Error concerning the person shall only invalidate the contract where consideration for such person should have been the main cause thereof. A simple error in counting shall give rise only to its correction'. According to case law regarding Section 1266 of the Civil Code, a mistake is fundamental and therefore there is a right of avoidance (Sections 1300 and ff. of the Civil Code) when: - the mistake affects the conditions that have been a decisive cause of conclusion of the contract so the party, but for the mistake, would not have concluded it or would have done so only on fundamentally different terms. - the mistake has been caused -not necessarily by fraud-by the other party	=

	or at least the other party knew of the mistake. - the mistake cannot be avoided with ordinary diligence. -the other party made the same mistake.	
FI	Section 33 in Contract Law: A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances. Concerning the mistake of both parties, there is no such provision.	+
FR	A mistake is regulated by Art. 1110, of the Civil Code and case law: A contract may be void if the mistake is provoked by the other party or if that other party makes the same mistake (e.g. Cass. civ. 1re, 17 sept. 2003, Bull. civ. I n° 183). In French Law, a mistake (even on a minor subject) always avoids the contract when this mistake is due to fraud of the other party (Cass. civ. 3e, 21 févr. 2001, Bull. civ. III, n° 20).	Slightly +
HU	Under Art. 210 (1) and (3) of the Civil Code the party acting under a misapprehension regarding any essential circumstance at the time of the conclusion of the contract is entitled to challenge his contract statement if his mistake had been caused or could have been recognised by the other party. If the parties had the same mistaken assumption at the time of the conclusion of the contract, either of them may challenge the validity of the contract.	=
IT	Under Art. 1428 of the Civil Code a right of avoidance exists when the mistake is essential and recognisable by the other party. Italian case law under this Art. admits a right of avoidance also without the required condition of recognisability when the same mistake is made by the other party. There is no provision about the right to claim for damages against the party who caused the mistake.	+
LU	Same protection (i.e. Art. 1110 of the Civil Code).	=
NL	Level of protection more or less the same (Art. 6:228 BW).	=
PL	Under Art. 84 of the Civil Code, where a declaration of will containing a mistake is made to another person, the mistake must be caused by that person (even without fault) or must be on which was known or should be known or could be easy have been noticed by that person. Under Polish law there is no provision about the other's party making the same mistake.	Slightly +
PT	- Avoidance for mistake depends on the condition that other party has known or should have known that the mistake concerned an element that was essential to the mistaken party. - Mutual mistake can lead to right of avoidance if it relates to the basis of contract (fundamental presuppositions of both parties). - Simple causation of the mistake gives no right of avoidance (Arts. 247, 251 and 252 of the Civil Code). However, in B2C contracts if the mistake was caused by violation of the duty to inform by the business and it affects adequate usage of the good or service, the consumer can rescind the contract within a short delay of 7 days (Art. 8, para 4 of the Consumer Protection Act [CPA]).	Slightly +
RO	In accordance with the provisions of the Romanian Civil Code, the error is capable of invalidating the consent when it bears to the substance of the essential things or matters falling within the scope of the agreement or to the person in whose consideration the agreement has been	+

	concluded with.	
UK	- Avoidance in the case of a mistake caused by the other party falls under the rubric of misrepresentation or, in Scotland, induced error. - Concerning the latter case that the other party knew or could be expected to know the mistake and was required to point it out, there is no provision. - Mistake by both parties gives the right of avoidance only under very restrictive conditions, almost requiring that the contract was in fact impossible to perform, Scottish law takes a slightly less restrictive approach.	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Consumers would be able to claim damages for mistakes in well defined situations. At present, many national laws foresee the possibility for the consumer to avoid a contract only for some of these defined situations (e.g. UK, PT, IT, PL, FR, FI). Under a Common European Sales Law, consumers in these Member States would benefit from strengthened rules. In other Member States, where the current rules offer the same level of protection, consumers could gain some clarity as the rules on mistakes would list specific situations in which a party could avoid a contract for a mistake (e.g. HU, LU, NL, EE, ES).
Costs and benefits for businesses	
Costs for businesses	Some businesses might face some increase of costs as the result of strengthened rules concerning the situations in which a contract might be avoided and in which consumers may potentially claim damages (e.g. UK, PT ,IT, PL, FR, FI). However, the costs are considered to be minor as they would mostly impact on the small number of traders who act in contrary to fair trading principles and conclude a contract not pointing out a mistake.
Benefits for businesses	Businesses would benefit from more clear rules concerning their rights and obligations.

Fraud

Issue:

In the existing consumer acquis there is no contract law rule on fraud and its consequences.
A Common European Sales Law could introduce a right of each party to avoid a contract for fraud. Fraud can take place orally, by conduct or by fraudulent non-disclosure of information which good faith, fair dealing or any pre-contractual information duty require the other party to be informed about.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
AT	Not explicitly said in the rule on fraud (§ 870 ABGB). But requirement included in § 871. Also: § 928 handles liability for fraudulent silence on a defect.	=
BE	The right of avoidance for fraud requires that the fraud is committed by the other party. Keeping silent about certain information constitutes fraud where the party not disclosing the information has an obligation to provide information. That obligation may result from a specific legal provision (e.g. Art. 4 Market Practices Act: the general duty / obligation of information) or the special responsibility or competence of that party, e.g. a specialised business and a consumer who could reasonably not obtain the information but from the business.	=
DE	German law provides a similar protection: under case law on § 123 BGB.	=
EE	Estonian law provides a similar protection: under the General Part of the Civil Code, Act § 94 (2).	=
ES	Spanish law offers a similar protection: Under Section 1269 of the Civil Code, 'Fraudulent misrepresentation exists where, with insidious words or machinations on the part of one of the contracting parties, the other party is induced to enter into a contract which he would not have done without them'. Although Section 1269 of the Civil Code does not foresee the right to avoidance by fraudulent non-disclosure of any information which good faith or any pre-contractual information duty required that party to disclose, it is inferred from case law regarding this Section.	=
FR	French jurisprudence offers a similar protection: fraud because of non disclosure of information (Cass. civ. 3e, 15 janv. 1971, Bull. civ. III, n° 38), by application of Art. 1116 of the Civil Code dealing with fraud.	=
HU	Hungarian law provides the same protection based on the interpretation of Art. 4 (1) and 210 (1) of the Civil Code.	=
IT	According to Italian case law under Art. 1439 of the Civil Code, the notion of fraud includes fraudulent non-disclosure of any information and false representation.	=
LU	Luxembourgish law provides the same protection: under Art. 1116 of the Civil Code.	=
NL	The level of consumer protection under fraud in Dutch Law (Art. 3:44 BW) is more or less the same. However, in practice, it is almost impossible to prove fraud under Dutch law where the fraud is said to be constituted by keeping silent in breach of good faith and fair dealing, as the Supreme Court has determined that the consumer (as the trader's counterpart) bears the burden of proof that the trader has concealed the relevant fact - i.e. acted on purpose – and that where the trader has 'merely forgotten' to mention the relevant facts does not give ground to a claim for fraud (see HR 2 May 1969, NJ 1969, 344 (Beukinga/Van der Linden).	+
PL	There is no general duty of disclosure under a regulation of fraud (Art. 86 of the Civil Code) – Under the circumstances such a duty could arise from the good faith and fair dealing rule.	+

PT	Portuguese law offers the same protection according to Arts. 227 para 1 and 253, para 2, of the Civil Code.	=
RO	Under the Romanian Civil Code, the fraud constitutes a cause for invalidating an agreement if the fraudulent means used by a party leaves no room for interpretation that the other party would have not entered into the agreement had he been aware of them. However, there is no protection for fraud committed in the pre-contractual phase except for remedies based on the Romanian Civil Code provisions relating to tort.	=
UK	No such rule (unless the parties are in a relationship of trust and confidence).	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	At present, in most Member States there are general rules in case law that ensure a similar level of consumer protection (e.g. AT, BE, DE, ES, FR, HU, IT, PT, RO) Nevertheless, in these countries consumers would benefit from having more clear and specific rules. Consumer confidence would increase, as it would be easier to assert the consumers right in case of a fraud.
Costs and benefits for businesses	
Costs for businesses	No additional costs for businesses as in most Member States the current rules provide for avoidance of a contract for fraud. Any potential costs would only arise for rogue businesses which use fraudulent practices, possibly in countries where the present rules are not so clear (e.g. UK, PL).
Benefits for businesses	Legitimate businesses would gain a competitive advantage as clear rules against fraud would eliminate rogue traders using fraudulent practices. In the case of concluding a contract based on the consumer's fraudulent non-disclosure of information, it would be easier for businesses to avoid such a contract.

Unfair exploitation

Issue:
In the existing consumer acquis, there is no contract law rule regarding unfair exploitation.
A Common European Sales Law could introduce a right for a party to avoid a contract if, at the time of the conclusion of the contract:
- the party was dependant on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and
- the other party knew or could be expected to have known this and took an excessive benefit or unfair advantage

Legal comparison:

Country	**Provision comparison**	Impact on the level of consumer protection
AT	Same provisions: covered by § 879 (2) 4 ABGB. Invalidity of	=

	contracts contra *bonos mores*.	
BE	There is no general principle or rule in Belgian law that a contract is avoidable in case of unfair exploitation. The avoidance of unfair terms in consumer contracts is seen as a lex specialis. There is also a special provision in the Civil Code on loans for interest that gives the judge the power to reduce the borrower's obligation to reimburse the loan and/or to pay interests where the lender has exploited the weakness, the passion or the ignorance of the borrower by charging an interest that is manifestly excessive. (Art. 1907 of the Civil Code).	+
DE	German law contains similar provisions, under § 138 BGB and case law; this case is constructed not as a right of avoidance, but as a nullity of the contract or juridical act.	=
EE	Estonian law contains similar provisions in the General Part of its Civil Code Act § 96.	=
ES	Under Spanish law, there is no general possibility of avoiding the contract for unfair advantage except where: (i) there is duress; (ii) there is some quantitative disadvantage in very specific cases involving minors and similarly situated persons, and no other remedy is available; (iii) in certain Spanish regions -Cataluña, Navarra- where the traditional rescission by seller for *laesio enormis* is applicable.	+
FI	Finnish law provides a similar protection: Section 31 in the Contracts Act provides that if anyone, taking advantage of another's distress, lack of understanding, imprudence or position of dependence on him/her, has acquired or exacted a benefit which is obviously disproportionate to what he/she has given or promised or for which there is to be no consideration, the transaction thus effected shall not bind the party so abused.	=
FR	Art. L. 122-8 of the Consumer Code prohibits '*abus de faiblesse*' (weakness abuse) through criminal prosecution. As a civil sanction mistake could make the contract void. Case law has also developed the idea of '*contrainte économique*' (economic constraint) on the basis of threat (Art. 1112, of the Civil Code) which is a cause of avoidance (Cass. civ. 1re, 30 mai 2000, Bull. civ. I, n° 169. - 3 avr. 2002, Bull. civ. I, n° 108).	=
HU	Under Art. 202 of the Civil Code if a contracting party has stipulated an unreasonably disproportionate advantage at the conclusion of the contract by exploiting the other party's situation, the contract shall be null and void.	=
IT	Under Art. 1448 of the Civil Code the party is entitled to avoid the contract when there are specific conditions such as: a) 'ultra dimidium' disproportion among the reciprocal obligations; b) the party had urgent needs; c) the other party exploited the first party's situation by taking an excessive benefit or an unfair advantage.	=
LU	Luxembourgish law provides a similar protection: Art. 1118 Code Civil.	=
NL	Dutch law offers a similar protection: under 'abuse of circumstances' in Art. 3:44 BW.	=
PL	Polish law offers a similar protection: under Art. 388 of the Civil Code in a case of unfair exploitation, a party may demand a reduction of its own performance or an increase in the performance due it and in the event that one or the other would be excessively difficult, it may demand that the contract be declared invalid.	=

PT	Portuguese law offers a similar protection: under Art. 282 of the Civil Code, if the other party has drawn excessive or unjustified benefits of the exploitation. This Art. also applies to other conditions, namely the exploitation of dependency, weakness of character or mental state of the other party.	=
RO	Romanian Civil Code provides the possibility to invalidate the agreement on grounds of lesion for the minors and other incapacitated persons. Under Romanian consumer protection legislation, the unfair exploitation may be inferred from any clause which was not negotiated with the consumer and which created in the detriment of the consumer (between the rights granted and the obligations undertaken) and contrary to the good faith principle, a significant imbalance.	=
UK	English law provides a similar protection if either the parties have a relationship of trust and confidence or one of them is a 'poor and ignorant person', who acts without advice. In Scotland there can be avoidance for; facility and circumvention;. This is not limited to cases of necessity or ignorance but requires some mental weakness, some lesion and some element of deceit or dishonesty on the part of the exploiting person.	Slightly +

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Consumers would benefit from having clear protection against unfair exploitation e.g. they would be able to avoid a contract if they were in economic distress, or had urgent needs, were improvident, ignorant, inexperienced of lacking of bargaining skill and the other party knew this and took an excessive benefit from it. Consumers would particularly benefit in the small minority of countries where at present the rules are less specific (e.g. BE, ES, UK).
Costs and benefits for businesses	
Costs for businesses	No additional costs for businesses as in most Member States (e.g. AT, DE, FI, IT, RO, PL, PT, NL, LU, FR, HU, EE) the current rules provide for the similar level of consumer protection against unfair exploitation. Any increase in costs would affect only rogue traders that currently benefit from less strict rules on unfair exploitation in a few Member States (e.g. UK, ES, BE)
Benefits for businesses	Businesses would benefit from relying on one set of clear rules concerning unfair exploitation.

Interpretation in favour of consumers

Issue:

According to the existing consumer acquis, where there is doubt about the meaning of a contractual term which has not been individually negotiated the interpretation most favourable to the consumer shall prevail (Art. 5 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts).
A Common European Sales Law could possibly extend this interpretation rule to all contractual terms whether they are individually negotiated or not, unless the term was supplied by the consumer.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
AT	General 'unclearness rule': An unclear statement is interpreted to the detriment of the party who used it (§ 915 ABGB).	Slightly +
BE	In case of doubt about the meaning of a contract term in a contract between a business and a consumer, whether supplied by the consumer or not (the law does not make a distinction here), the interpretation that is most favourable to the consumer prevails (Art. 40, § 2, Market Practices Act).	=
DE	Interpretation rule in favour of consumers (§ 305c (2) BGB) does not apply for individually negotiated terms.	+
EE	The Estonian law does not contain such provision. This could be taken into account under the rules of objective interpretation but not as an obligation (LOA § 29 (4)). Special rule on interpretation of standard terms contracts in favour of the other party (LOA § 39).	+
ES	In case of doubt about the meaning of standard terms, interpretation most favourable to consumer prevails (Section 80.2 TRLGDCU).	+
FI	According to the Consumer Protection Act Chapter 4 Section 3 and 4: If a term in a contract referred to in this Act has been drafted in advance without the consumer having been able to influence its contents and if uncertainty arises as to the significance of the term, the term shall be interpreted in favour of the consumer. If a dispute arises as to whether a term referred to in sections 2 and 3 has been drafted in advance, the burden of proof of this shall lay on the business.	+
FR	Art. L. 133-2 of Consumer Code provides this solution. The general rules are on Art. 1162 of Civil Code; according to case law the contract is interpreted against the party who has drafted it (Cass. Civ. 1re, 22 oct. 1974, Bull. civ. I, n° 271).	=
HU	Same solution according to Art. 207 (2) of the Civil Code: in general, in the event of a dispute, the parties shall, in light of the presumed intent of the person issuing the statement and the circumstances of the case, construe statements in accordance with the general accepted meaning of the words. However, in consumer contracts the national law creates an exception: according to the referred Art. of the Civil Code, if the contents of a consumer contract cannot be clearly established, the interpretation that is more favourable to the consumer shall be authoritative.	=
IT	Italian law provides the same protection (Art. 35 co. 2 Consumer Code; Art. 1370 of the Civil Code).	=
LU	Luxembourgish law offers the same protection (Art. L.211-2 (2) Code Consommation)	=
MT	Art. 1009 of the Civil Code: In case of doubt, the agreement shall be interpreted against the obligee and in favour of the obligor. In addition, Art. 47(2) of the Consumer Affairs Act provides that 'where any term is ambivalent or any doubt arises about the meaning of a term, the interpretation most favourable to the consumer shall prevail'.	=

NL	A general rule to this extent does not exist in Dutch law; *contra proferentem* may at most be one of the factors to be taken into account. The *contra proferentem* rule applies as a rule only with regard to not-individually negotiated terms in consumer contracts, see Art. 6:238(2) of the Dutch Civil Code, introduced in order to implement Art. 5 of the Unfair Terms Directive.	+
PL	Under Art. 385 §2 of the Civil Code interpretation *contra proferentem* is recognised for standard terms in consumer contracts (without limitation of terms supplied by consumer).	+
PT	Portuguese law does not contain such provision.	+
RO	Under the Romanian legislation, in case of doubt about the meaning of standard terms, the interpretation which is most favourable to consumers prevails.	+
UK	No such a rule. However, courts do seem to interpret contracts in favour of the consumer. In England, Wales and Scotland *contra proferentem* rule might lead to this result, but not confined to consumers.	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts:

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Consumers would benefit in case there is doubt about the meaning of a contractual term, negotiated or not, as the interpretation most favourable to the consumer shall prevail in this case. In many Member States, the interpretation in favour of consumers apply only to standard terms and individually negotiated terms are excluded (e.g. DE, RO, PL, NL, FI, ES). As businesses would try to avoid any potential doubts as to the interpretation of the contractual terms, consumers might also benefit from having more clear contracts.
Costs and benefits for businesses	
Costs for businesses	There could be some additional costs for companies in case of doubts about the meaning of a contractual term which has not been individually negotiated as the interpretation most favourable to the consumer is also likely to be more costly for businesses. These additional costs are expected to be rather minor as they would only occur in case of doubts as to the interpretation and businesses would be interested in avoiding such situations by making sure that the contractual terms do not raise any doubts. For companies in a number of Member States (e.g. IT, LU, MT, HU) there would be no change as the current rules provide for similar levels of protection as a Common European Sales Law.
Benefits for businesses	Businesses might gain indirectly from having more clear terms in contracts which do not leave scope for divergent interpretation.

Terms unfair as not sufficiently drawn to the consumer's attention

Issue:

A Common European Sales Law could protect against standard terms of which the party not supplying the terms could not be aware: contract terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

Moreover, a term could be considered as not sufficiently brought to the consumer's attention by the mere reference to it in a contract document, even if the consumer signs the document.

Country	Provision comparison	Impact on the level of consumer protection
BE	Under Belgian law, the control of unfair contract terms in B2C relations extends to terms that have been individually negotiated. Although there is no such provision in Belgian law, with regard to B2C contracts, Art. 74(26°) MPCPA states that the following term is in all circumstances unlawful: a term which determines irrefutably the consent of the consumer with stipulations of which the consumer actually could not be aware of is sanctioned with nullity according to Art. 75, §1 MPCPA (Black listed). It should be noted that under general contract law not individually negotiated terms will not be deemed to be accepted (and will therefore not constitute a part of the contract) unless the other party has – at the latest at the moment when the contract was concluded – knowledge of those terms or could have obtained knowledge of those terms and has accepted those terms. - Regarding the mere reference to the term in a contract document: there is no express provision in Belgian law to that effect. Case law is not uniform in relation to the acceptation of standard-terms. However, generally the courts rule that the mere reference to their existence or that the standard terms can be consulted somewhere will not suffice. It is generally held that the business has a duty to make standard contract terms available to the consumer. General clauses are preferably written on the front side of the contract and if they are provided for on the back, there must be a clear reference to them on the front side of the document.	=
EE	- Estonian law provides this principle as part of the fairness control: § 37-Standard terms as part of contract: (1) Standard terms are part of a contract if the party supplying the standard terms clearly refers to them as part of the contract before entering into the contract or while entering into the contract and the other party has the opportunity to examine their contents. Standard terms are also part of a contract if their existence could be presumed from the manner in which the contract was entered into and the other party was given the opportunity to examine their contents. (2) The parties may (…) agree in advance that standard terms apply to certain types of contracts. - Regarding the mere reference to the term in a contract document: no such rule exists in Estonian law.	= +
ES	- A provision in Section 5 of the Standard Form Terms Act (Ley 7/1998, de 13 de abril, LCG) determines that a standard term will not be incorporated to the contract if the supplier of the term did not effectively ensure that the other party knew of the existence and content of the term. In B2C, according to Section 80 TRLGDCU, terms supplied by one party and not individually negotiated must fulfil the following conditions: (i) have precise, clear and simple writing; (ii) be accessible and legible in order to let consumers know the existence and content of the contract before its celebration.	= Slightly +

	- Regarding the mere reference to the term in a contract document: No similar provision exists in TRLGDCU, but it is clear from the above rules just mentioned. A clearer rule such as the one envisaged would provide a slightly higher protection.	
IT	- There is no such provision under Italian law. Nevertheless, Art. 34 co. 5 Consumer Code provides the general rule by which the business bears the burden of proving that it has provided all the information required. Moreover, the general clause stated by Art. 35 co.1 Consumer Code provides a duty of plain and intelligible language in the drafting of written terms. - Regarding the mere reference to the term in a contract document: there is no such provision under Italian law. However, Art. 34 co. 4 – 5 Consumer Code on the duty of plain and intelligible language can be interpreted as to reach a similar result. According to Italian case law under the above mentioned Art. (Cass. 8.6.2007, n. 13377; Cass.26.9.2008, n. 24262), terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.	+ =
HU	- No such specific provision in the national law. However, Art. 205/B (1) of the Civil Code provides that standard terms become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance. Finally, according to Art. 209 (4) of the Civil Code, a standard contract condition or a contractual term of a consumer contract which has not been individually negotiated shall be regarded as unfair if they are not drafted in plain, intelligible language. - Regarding the mere reference to the term in a contract document: no such provision in the national law.	= +
LU	- L.211-1 Consumer Code refers to compliance with Art. 1135-1 Civil Code (' Les conditions générales d'un contrat préétablies par l'une des parties ne s'imposent à l'autre partie que si celle-ci a été en mesure de les connaître lors de la signature du contrat et si elle doit, selon les circonstances, être considérée comme les ayant acceptées'). Such terms cannot be enforced (inopposabilité) - Regarding the mere reference to the term in a contract document: the Consumer Code blacklists the following clause which pursues a similar objective : 'Les clauses qui constatent de manière irréfragable l'adhésion du consommateur à des clauses dont il n'a pas eu, effectivement, l'occasion de prendre connaissance avant la conclusion du contrat' – L.211-3 (23)).	=
PL	- There is a provision in the grey list of unfair contract terms under which a term is presumed to be unfair if the consumer was not aware of them (Art. 3853 (4) of the Civil Code). - Regarding the mere reference to the term in a contract document: there is no such special provision.	 +
PT	- Terms are excluded from a contract if the party supplying the terms did not fulfil the duty of communication or the duties of information to the other party about the terms– Arts. 5, 6 and 8 of the Decree-Law 446/85, from the 25th of October 1986. When the other party was not aware of the terms, they are also automatically excluded if there was a lack of communication or information or if, by their context, title or presentation, the said terms would not be noticed by a normal	=

	contracting party in the position of the real one (Art. 8 of the Decree-Law 446/85). - There is no specific provision on the mere reference to the terms in a contract document. However, terms included after the signature, or terms included and referred to in a signed document are not included in the contract if the duties of communication and information were not fulfilled.	
UK	England and Wales: Where the relevant term is not in a signed document but, for example on a ticket, then they will be incorporated into the contract only if the party supplying them gives reasonable notice of the terms to the other party. Where a term is unusual or onerous, the degree of notice required is greater and it may be necessary to draw attention to the term specifically. Where the term is in a document that has been signed by the other party, it will form part of the contract; but the legislation controlling unfair terms (Unfair Contract terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1999) are frequently used (when applicable) to deal with clauses that are surprising to such an extent that they can be seen as unfair. Scotland: No such express general rule. However, a contract term may be regarded as unfair under the Unfair Terms in Consumer Contracts Regulations 1999 if it has the effect of irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract.	Slightly + +

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Consumers would be more clearly protected against terms supplied by businesses of which they were not aware. Such terms could be invoked only if a trader took reasonable steps to draw the consumer's attention to them, before or when the contract was concluded. A term could be considered as not sufficiently brought to the consumer's attention by the mere reference to it in a contract document, even if the consumer signs the document. At present, in a number of Member States the rules are less strict i.e. the mere reference to the term in a contract document is sufficient (e.g. HU, EE, PL, UK). Consumers in these countries would gain more confidence as they would need to be made aware of all the terms supplied by businesses or otherwise regard this term as unfair. As a result, they would be able to make well informed purchasing decisions.
Costs and benefits for businesses	
Costs for businesses	Businesses supplying the terms to a contract would be obliged to take reasonable steps to draw consumers' attention to them, before or when the contract is concluded. Business from countries where the similar rules are in place at present (e.g. BE, PT, LU, ES) would not bear any additional costs. Any costs would only affect traders that insert terms in the contract and do not inform the other party about them in a sufficient way at present. However, these costs are considered as minor as the reasonable steps to inform the other party about inserted terms would in practice be relatively easy to implement.
Benefits for	Businesses would benefit from the increased consumer confidence. They could also

businesses	benefit from avoiding potential disputes with consumers if they bring all the contractual terms to consumers' attention.

Merger clauses

Issue:
In the existing consumer acquis there are no contract law rules on merger clauses.

A Common European Sales Law would introduce a provision on merger clauses as follows: where a contract document contains a 'merger clause' stating that the document embodies all the terms of the contract then any prior statements, undertakings or agreements which are not embodied in the document, do not form part of the contract. However, a consumer would not be bound by such a merger clause.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
AT	§ 10(3) KschG stipulates that the legal validity of formless declarations of the company cannot be excluded by contract to the detriment of the consumer.	=
BE	No such provision in Belgian law.	+
DE	German law offers a slightly lower protection: it follows case law on the general clause for unfairness controls of standard contracts, § 307 BGB.	+
ES	No specific provision on merger clauses for consumer contracts.	+
FI	There is no special provision in Finnish law. If such clauses were used, they would probably be considered as unreasonable.	+
FR	No provision and no case law.	+
HU	There is no specific provision on this issue in national law.	+
IT	Italian law offers the same protection: according to case law under Art. 34 co. 4 of the Consumer Code, merger clauses do not demonstrate the existence of an individual negotiation. (Cass. 13890/05).	=
LU	Luxembourgish law offers the same protection, even if not explicitly laid down.	=
NL	A comparable rule does not exist in Dutch law. However, a merger clause which is not individually negotiated is presumed to be unfair if the clause would fundamentally limit the content of the trader's obligations that the consumer could otherwise reasonably have expected (see Art. 6:237(b) of the Dutch Civil Code). In such a case, the trader bears the burden to prove that the clause is nevertheless fair.	+
PL	Under Polish law there is no express regulation on a merger clause.	+
PT	No such general provision under Portuguese law.	+
RO	There are no specific provisions on merger clauses in consumer contracts.	+
UK	No such provision under English law.	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.

Benefits for consumers	Consumers would benefit as in most Member States the use of merger clauses is not prohibited as such (e.g. BE, ES, UK, PL, RO, PT, FR, HU). In several Member States, this issue is dealt within the context of the Unfair Contract Terms legislation (e.g. DE, NL). Consumers would gain more confidence as they would be able to rely on the clear invalidity of merger clauses attempting to reduce the obligation of the business following from prior statements, undertakings or agreements which are not embodied in the contract document.
Costs and benefits for businesses	
Costs for businesses	Businesses would need to adapt their contracts to eliminate any merger clauses. Any potential costs are likely to be one-off and affect only companies that are at present using such merger clauses. Business would also have to be aware that some prior statements, undertakings or agreements not embodied in the contract document may still bind them in their relationship with the consumer. However, the impact of this is likely to be minor as pre-contractual information required by the CRD and taken over by the Common European Sales Law for distance and off-premises contracts forms in any case an integral part of the contract.
Benefits for businesses	Businesses might gain indirectly from increased purchases by consumers who are able to rely on prior statements by businesses even if they are not explicitly mentioned in the contract.

Method of payment

Issue:

A Common European Sales Law could introduce a rule that, unless indications about the means of payment are made by the seller, ‚the buyer may use any form of payment. Consequently, a seller is obliged to accept all types of payment (e.g. cash, bank transfer or all types of debit or credit cards) when he or she did not make any previous indications about the method of payment, provided that the method of payment is one used in the ordinary course of business at the place of payment (i.e. the business' place of business) and is appropriate to the nature of the transaction.

Legal comparison:

Country	**Provision comparison**	**Impact on the level of consumer protection**
DE	There is no specific provision on method of payment. According to jurisprudence, payment by card or bank transfer must be (at least implicitly) agreed by the parties - (Münchener Kommentar BGB, § 362 Rn. 20 f., 364 Rn. 1.)	+
EE	LOA § 91 - Manner of performance of monetary obligations (1) provides: 'A monetary obligation may be performed in cash. A monetary obligation may also be performed in some other form if so agreed by the parties or if such form is used in the ordinary course of business at the place of payment.'	=
ES	Art. 1170 of the Spanish Civil Code provides that payment must be made in the agreed way and, if not possible, in money that is legal tender in Spain. No similar provision exists in TRLGDCU.	+
FI	In Finland there is no longer in force a rule which always obliges to accept payment in cash. If the consumer is offered the opportunity to pay with any available bank account debit card, this is usually considered as a	+

	sufficient alternative to payment in cash. Cash payment is any case the basic method of payment. If the seller does not accept cash or a debit card, the consumer must be informed separately already in the early marketing stage, so that he can take such information into account in his purchasing decisions. If the credit payment is the only payment method accepted by the seller, the consumer must be informed in advance.	
FR	There is no specific provision on method of payment in French consumer law.	+
HU	There are no such rules in the Civil Code (Ptk) at present. Currently businesses can and effectively do limit the form of payment (the type of cards) irrespective of the actual possibility of usage, for both face-to-face and distance sales. In the case of e-commerce it is quite frequent that the only possible form of payment is cash payment at the time of delivery, although contracting would be easier with the use of different cards.	+
IT	There is no specific provision on method of payment in Italian law. According to Art. 52 co. 2 lett. e) Consumer Code on distance sales and Art. 67-sexies co. 1 lett. f) Consumer Code on distance financial services, payment may be made by the methods established by the business and previously communicated to consumers. Specific provisions regarding payments with credit card for distance contracts can be found in Art. 56 co. 1 of the Consumer Code.	+
NL	The Dutch Civil Code decrees that payment is made in current money (Art. 6:112 of the Civil Code). Unless otherwise decreed by the creditor, payment can also take place via transfer to his bank account (Art. 6:114).	+
PL	Polish law obliges the trader to put – in the place of business – clear information which methods of electronic payment are accepted (Art. 11 of Ustawa z dn. 12 września 2002 r. o elektronicznych instrumentach płatniczych). It does not, however, oblige the seller to accept all types of payment cards in case he or she failed to determine the method of payment.	+
PT	There is no special provision on method of payment.	+
UK	England and Wales: No specific rule. The court is likely to reach this result as a matter of interpretation of the contract. Scotland: No such rule but same result is likely to be reached in practice.	Slightly +

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	Businesses would be able to indicate the most convenient methods of payment and avoid any potential compliance costs stemming from the obligation to accept more costly methods of payment e.g. credit cards. Therefore, there are likely to be no costs for consumers.
Benefits for consumers	If the means of payment are not indicated by a trader a consumer would benefit from the possibility of choosing the payment method which suits him best among these which are used in the ordinary course of business and are appropriate to the nature of the transaction. Businesses wishing to receive the payments by certain methods would need to indicate them to consumers. A consumer could therefore not be surprised by a unilateral restriction on the methods of payment imposed by the business, which would currently be possible under the national law of most of Member States. This would be the case for example in FR, DE, HU, IT, ES, PT, PL, NL, IT where there are no specific provisions on methods of payment in the national contract laws. Under

	these laws traders can force consumers without prior information to make a payment by a particular method which may be more costly and less convenient for them.
Costs and benefits for businesses	
Costs for businesses	Businesses would avoid any additional compliance costs as they would have the possibility to indicate the accepted methods of payment to consumers. Any potential costs would affect only traders who do not provide this information. In this case, they would be obliged to accept all types of payments which are used in the ordinary course of business and are appropriate to the nature of the transactions. As a consequence their margin could be reduced if consumers choose e.g. credit card payments. However, in practice most of the traders are very likely to indicate the accepted methods of payment thereby avoiding any additional compliance costs.
Benefits for businesses	Retailers would profit from an increase in both the buyer's confidence and easiness when performing a purchase.

Place of delivery

Issue:

The current acquis does not contain a provision regarding the place of delivery of goods in a consumer contract of sales. A Common European Sales Law could provide a specific default rule stating that, where the place of delivery cannot be otherwise determined, the place of delivery is in distance and off-premises contracts, or in contracts where the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence at the time of the conclusion of the contract.

Country	**Provision comparison**	**Impact on the level of consumer protection**
BE	There is no specific provision concerning the place of delivery in consumer sales and distance and off-premises contracts. However, general sales law (Art. 1609 of the Civil Code) determines that in the absence of an agreement, the place of delivery is the place where the good was at the time of the sale. Regarding the hypothesis 'where the seller has undertaken to arrange the carriage to the buyer', it could be considered as being an agreement on the place of delivery, but the text is more protective in that it clearly points out that the good must be delivered at the consumer's place of residence at the time of the conclusion of the contract.	+
EE	There is no such special provision under Estonian law.	+
ES	No similar provision exists in TRLGDCU.	+
HU	According to Art. 278 of the Civil Code the place of performance is the domicile or registered place of business of the obligor, unless: a) it is otherwise provided by legal regulation, b) the object or purpose of the service suggests otherwise, c) the object of the service is at a different location, which is known to the parties. If the object of a service is to be sent to a place other than the domicile or registered place of business of the obligor, and if such a place or an intermediate location has not been stipulated as the place of delivery, performance shall be deemed accomplished when the obligor delivers the object of service to the beneficiary, a shipping agent, or a carrier.	+

	In the case of consumer contracts, performance shall be deemed effected upon handing over to the consumer. If the obligor delivers the thing by its own means of transportation or through its representative, the place of performance shall be the domicile or registered place of business of the latter. For distance and off-premises contracts: the same rule applies.	
IT	There is no such provision under Italian law.	+
LU	No such rule in the Consumer Code.	+
PL	There is no such special provision under Polish law.	+
PT	There is no such provision in Portuguese law. According to the general rules of the Civil Code, the place of delivery will normally be the place where the good was at the time of the conclusion of contract (Art. 773, para 1).	+
UK	England and Wales: No clear rule but a court might well reach this result as a matter of interpretation of the contract. Scotland: No such express rule.	+

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers as a place of consumer's residence is in most cases the most convenient place of delivery.
Benefits for consumers	Consumers would benefit from having the goods delivered to their place of residence in distance and off-premises contracts or in contracts where the seller has undertaken to arrange carriage to the buyer (if the place of delivery cannot be otherwise determined). The delivery of goods to a consumer's place of residence would be very convenient for consumers. Consumers would not have to bear any costs of transportation of the goods from the place where the good was at the time of the conclusion of contract which is a default place of delivery at present in some Member States (e.g. PT, BE).
Costs and benefits for businesses	
Costs for businesses	Businesses in distance and off-premises contracts or in contracts where the seller has undertaken to arrange carriage to the buyer would have additional costs for delivering the goods to the consumer's place of residence at the time of the conclusion of the contract. These additional costs would depend on the delivery distance and might affect companies in most Member States where at present the rules are less protective for consumers (e.g.UK, PT, PL, LU, IT, HU, EE, ES). These costs would however occur only where the place of delivery cannot be otherwise determined e.g. was not agreed with a consumer.
Benefits for businesses	In many Member States there are no specific rules concerning the default place of delivery (e.g. PL, LU, IT, EE, ES). In these Member States, businesses could benefit from having clear rules on default place of delivery where the place of delivery cannot be otherwise determined.

Right to damages for non-performance

Issue:

The current acquis does not provide for rules on damages for non-performance, but defers the matter to national laws.

A Common European Sales Law could provide a right to damages for non-performance of contractual obligations, unless the non-performance is excused.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
BE	There is a right to damages under general law of obligations (See Art. 1649 quinquies § 1 C.C.)	=
DE	According to German law, there is a right to damages.	=
EE	Remedies are available for all kinds of non-performance.	=
ES	Damages for non-performance would be covered by general rules of the Spanish Civil Code: liability will depend on the proof of effective damages caused by non-performance and/or the existence of an accepted offer -particularly in those cases where a binding offer is required by law.	=
FR	French consumer sales law provides for legal warranty of conformity. Nevertheless, a claim under the legal warranty does not preclude the consumer from using the rights he derives from general contract law for performance (Art. L 211-13 of the Consumer Code). According to Art. 1184 of the Civil Code the party faced with non-performance of his contracting partner may either require specific performance or resolve the contract without prejudice of damages according to Art. 1147 of the Civil Code. For the consumer it is always possible to claim the damages in case of non-performance.	=
HU	According to Art. 310 of the Civil Code, apart from guarantee rights, consumers are entitled to damages resulting from lack of conformity under the rules of indemnification. If the consumer suffers damages because of a faulty performance, he can ask for reimbursement of his damages according to the indemnification rules. This in practice means that the consumer can only receive reimbursement through a litigation process if the business is not willing voluntarily to give such a reimbursement.	=
IT	Italian consumer sales law provides for legal warranty of conformity. Nevertheless, a claim under the legal warranty does not preclude the consumer from using the rights he derives from general contract law. There is a general right to damages for non-conformity unless the seller has ignored them without fault (Art.1494 of the Civil Code) The party faced with non-performance of his contracting partner may either require specific performance or terminate the contract without prejudice of damages (including actual damages and loss of profit, but not punitive damages).	=
MT	Maltese law has general rules about damages for non-performance (Art. 1125 of the Civil Code: 'Where any person fails to discharge an obligation which he has contracted, he shall be liable in damages').	=
NL	Under Art. 6:74 BW, any failure to fulfil an obligation shall require the debtor to compensate the creditor for the damages he suffered due to the non-performance, unless the non-performance is excused.	=

PL	Polish law has general rules about damages for non- performance (Art. 471 of the Civil Code).	=
RO	The consumers are entitled to damages arising out of the lack of conformity of the products ascertained within the warranty period. The consumers are entitled to damages according to the general provisions of the Romanian Civil Code.	=
UK	Under English law, there is a right to damages.	=

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	At present, most Member States have general rights to damages for non-performance (e.g. BE, EE, ES MT, HU, NL, HU, IT, PL,FR, RO, UK). The level of consumer protection would not change. Consumers would be able to claim compensation for non-performance of a business's obligations.
Costs and benefits for businesses	
Costs for businesses	No additional costs for businesses as in most Member States the current rules provide for damages for non-performance.
Benefits for businesses	Businesses would benefit from relying on one set of clear rules on damages for non-performance. Businesses performing their obligations diligently may gain additional customers.

Length of the prescription periods

Issue:

In the current acquis (Consumer Sales Directive 1999/44/EC), the business is liable for the lack of conformity of the goods which becomes manifest during 2 years from the moment the goods are delivered to the consumer.

A Common European Sales Law would not contain such a fixed liability period during which the consumer could still claim lack of conformity. Instead the general rules on prescription would apply. A prescription period would run for 2 years from the moment the consumer has knowledge of the defect, but no later than for 10 years from the moment the goods were delivered. In practice, the result would be comparable to the existing acquis. While the starting point would be slightly later, i.e. knowledge of the defect extent of delivery, the period would be slightly shorter as contrary to the substantive period of the Consumer Sales Directive, the consumer would need to undertake the necessary steps before the end of the prescription period in order to prevent its effects.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
BE	No longer than 2 years.	=
DE	Prescription after 2 years (except for building materials), cf. § 438 BGB.	=
EE	No longer than 2 years.	=

ES	Under Spanish Law – Art. 123 RD 1/2007 – the seller responds for the lack of conformity of the product for 2 years after the delivery. If the product is second hand, this period could be reduced to a minimum of 1 year. However, general rules on breach of contract may be used, and here the limitation period is very generous (15 years).	=
FR	Under the French Consumer Code, the action resulting from lack of conformity lapses two years after delivery of the product. However, it must be noted that a claim under the Consumer code does not preclude the consumer from using the rights deriving from general sales law of the Civil Code. Then according to those general rules (Articles 1641 and following) the buyer has 2 years to bring a claim after having discovered the defect (Civ. Code, Art. 1648, para. 1). This means that the guarantee is prescribed by the general prescription duration (5 years, under Art. 2224 of Civ. Code: 'personal or movable actions prescribe in 5 years from the date on which the holder of a right knew or should have know of the facts to enable him to exercise it'). However, the buyer must be particularly vigilant when taking delivery of the product because many decisions have considered that the silence of the buyer when faced on delivery with a product which had an apparent vice or was not conform to what had been contractually agreed upon could be interpreted as a tacit acceptance of the non-conformity, thus depriving the buyer of any future claim for non-performance of the obligation of conform delivery relating to the said non-conformity.	-
HU	In general the time limit is 2 years, but if the consumer is unable to enforce his claim for an excusable reason, particularly if lack of conformity, owing to its character or the nature of the goods, is not apparent within the 2-year time limit, in the case of goods designated for long-term use the consumer may enforce his rights within 3 years of delivery. If the statutory use period exceeds 3 years, this time limit shall apply to the enforcement of such a claim (Art. 308 and 308/A of the Civil Code). This extended (long) guarantee period can only be found in 2 current regulations: the first is a Common Decree from 1985, which states that the statuary use date in case of building materials is 5 years or in certain cases 10 years (e.g. walls, balusters). The second is the Government Decree of 151/2003 on the obligatory express warranty regarding goods designed for long-term use.	=
IT	The seller is liable if the defect occurs within 2 years after delivery (Art. 132 Consumer Code). It must be noted that a claim under the legal warranty does not preclude the consumer from using the rights he derives from sales law as a buyer and from general contractual rules. According to Art. 135 Consumer Code, consumers' rights under other statutory instruments shall not be limited or repealed by the provisions relating to the legal warranty. In principle, the consumer can also recover the damages according to the conditions of Italian sales law (Art. 1494 of the Civil Code). In this last case the ordinary limitation period (10 years – Art. 2946 of the Civil Code) applies.	=
LU	Consumers may invoke the hidden defects (vices cachés) provision of Art. 1641 sequ. Code Civil which is not limited in time. This is a mandatory right for B2C contracts (Art. 1645 of the Civil Code).	-
NL	NL law does not contain a fixed liability period after which the consumer can no longer claim lack of conformity with the contract (see Art. 7:21-23 BW). Whether or not a consumer can still claim lack of conformity	=

	depends on which expectations he could reasonably have, given the circumstances of the case.	
PL	There is no such provision in Polish law. Under Art. 10 (1) of the Consumer Sales Act, the seller is liable where the lack of conformity becomes apparent within 2 years from the delivery of the goods, unless the seller knew about the lack of conformity at the time of conclusion of the contract and did not inform the consumer.	=
RO	The seller's liability is engaged for lack of conformity if the defect becomes apparent within 2 years of the delivery of the good (in second-hand goods, within 1 year).	=
UK	The UK has not introduced the 2-year time limit for business liability (from the time of delivery of the goods). UK law relies on the general limitation period for commencing a legal action for a breach of contract, from the date of the contract (the Limitations Act 1980 allows a consumer to claim for up to 6 years after the date of purchase). Once the defect is discovered, then the consumer may lose his right to terminate the contract because of the rules on acceptance.	-

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	In a small number of countries e.g. the FR and the UK where the current liability period during which the consumer can still claim lack of conformity is more favorable to consumers (the UK law allows a consumer to make claims regarding non-conformity up to 6 years after the date of purchase and in FR, the business would be liable 5 years from the moment the consumer has knowledge of the defect) the consumer might be slightly disadvantaged. However, considering that most failures are likely to occur once the consumer starts operating the product after buying, the costs for consumers are likely to be minor.
Benefits for consumers	Consumers would be able to assert their rights over a 2- year period from the moment the consumer has knowledge of the defect, but no later than 10 years from the moment the goods were delivered. This would increase the level of consumer protection in e.g. PL, RO and HU.
Costs and benefits for businesses	
Costs for businesses	No major additional costs for businesses as in practice the current 2-year substantive period which applies in most MS at present and the proposed 2-year prescription period provide for a similar result as regards level of consumer protection. This is because most defects appear once the consumer starts operating the product after the purchase and the consumer would still need to undertake the necessary steps before the end of the 2-year prescription period in order to prevent its effects.
Benefits for businesses	There would be some minor benefits for businesses from e.g. UK and FR where at present consumers can claim lack of conformity for the longer period of time. Retailers in general would benefit from increased consumer confidence.

Period for notifying the seller of non-conformity in B2C contracts

Issue:

Under the acquis, Member States may provide that, in order to benefit from his right, the consumer must inform the seller of the lack of conformity within a period of 2 months from the date on which he detected such lack of conformity. 17 Member States have implemented such a limitation[433].
A Common European Sales Law could introduce a rule that the consumer does not have to give notice to the seller of a lack of conformity within a certain period after which the consumer discovered it. The lack of notice within a certain time would therefore not deprive the consumer of his remedies based on the lack of conformity.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
DE	There is no 2-month-rule.	=
EE	The obligation to notify is limited to reasonable time.	+
ES	Under Spanish law – Art. 123.5 RD 1/2007 – the consumer must notify the seller of the non-conformity within 2 months. In case of failure to notify within 2 months, the consumer loses his right to damages but does not lose his substantive remedies for non-conformity.	Slightly +
FI	Section 16 – Notice of defect (16/1994) (1) The notice of defect may always be given within 2 months of the buyer's discovery of the defect; it may also be given to the business that has sold the goods on behalf of the seller or assumed liability for the characteristics of the goods.	+
FR	There is no rule in French law compelling consumer to notify non conformity within 2 months. Under the general sales rules of the Civil Code, Art. 1648, the consumer has to bring his legal action within 2 years of the discovery of the defect.	=
HU	The general rule is that the trader must be informed of any lack of conformity within the shortest time permitted by the prevailing circumstances. However, according to Art. 307 (2) of the Civil Code in the case of consumer contracts, if notification of the lack of conformity is made within 2 months of the time it is detected, it shall be deemed that notification was made in due time. Any agreement of the parties to the contrary shall be null and void.	+
IT	The consumer loses the rights to claim for the legal warranty if he does not inform the seller of the lack of conformity by no later than 2 months after the date on which he discovered it. This notification shall not be required only in case the seller has acknowledged the existence of the lack of conformity, or has concealed it.	+
LU	There is no rule in Luxembourgish law with such a time limit to notify the defect.	=
MT	Art 79. 1 of the Consumer Affairs Act provides a 2 month time limit to notify the defect.	+
NL	Under Art. 7:23 BW, the consumer loses his rights if he does not inform the seller of the discovery of the defect within a reasonable time. In case of a B2C contract a notification within 2 months is considered to be reasonable.	+

433 Consumer Law Compendium, http://www.eu-consumer-law.org/directives_en.cfm

PL	Under Art. 9 (1) of the Consumer Sales Act the consumer must inform the seller of the lack of conformity within period of 2 months from the date on which he detected it, unless the seller knew about the non-conformity with the contract and did not inform the consumer (Art. 10 (4)).	+
PT	The consumer must notify the seller of a non-conformity within 2 months of when he detected it for movable goods and within one year for immovable goods.	+
RO	Obligation to notify within 2 months	=
UK	There is no such provision under UK law.	=

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Consumers in the 17 Member States (i.e. BG, CY, DK, EE, ES, FI, HU, IT, LT, MT, NL, PL, SL, PT, RO, SL, SE) where currently the notification within a given deadline is a precondition for the exercise of their right to remedies in case of lack of conformity would find themselves in a more advantageous position. They could rely on the remedies for the lack of conformity irrespective of the notification given. Thus, consumers who would not have been able to exercise their right to remedies because of missing the notification deadline would not lose their rights.
Costs and benefits for businesses	
Costs for businesses	The number of consumers now legitimately relying on the lack of conformity claims for remedies made later than 2 months after the consumers discovered the lack of conformity for these MS with a notification period is likely to increase only marginally (e.g. defects that seemed to be fixed, but then reappearing etc.). In 10 Member States where at present such a period is not set, businesses would not bear any additional costs. Business operating costs would increase (especially if the order of remedies will be freely chosen by consumer- see point 2.17), but the increase is likely to be insignificant. The risk of consumers discovering faults and claiming redress after the previous deadline of 2 months is not high, considering that most faults are likely to occur once the consumer starts operating the product after buying it.
Benefits for businesses	Businesses would benefit from the increased consumer confidence.

Remedies in case of lack of conformity

Issue:

Current EU consumer protection rules provide a hierarchy in which remedies can be invoked. According to Art. 3(3) of Directive 1999/44/EC, the consumer is obliged in the first instance to claim repair or replacement before being able to terminate the contract and return the faulty product. Termination of the contract or reduction in price can only be invoked if repair and replacement are impossible, or if repair or replacement could not be completed within a reasonable time or without significant inconvenience to the consumer. Art. 3(6) of Directive 1999/44EC provides that consumers cannot rescind the contract, if the lack of conformity is minor.

Member States however, are still allowed to regulate differently in favour of consumers; several countries have not adopted the two-stage hierarchy of remedies and made all four remedies available

to the consumer. The harmonised rules on hierarchy of sales remedies have been introduced in the CRD (chapter IV). However, the final version to be adopted very soon does not contain Chapters IV and V anymore.

A Common European Sales Law could provide:
- no hierarchy of sales remedies: consumers could freely choose a remedy in the case of a faulty product.
- possibility to terminate the contract in the case of any lack of conformity of the goods purchased, unless the lack of conformity is insignificant.

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
AT	There is a hierarchy of remedies. The buyer must first ask for repair or replacement, unless repair/replacement is impossible or too big a burden for the seller (§ 932(2) ABGB). § 8 KschG contains an additional rule on the way the repair should be done. The buyer can then ask for a reduction of price or, if not a minor defect, termination of the contract ('Wandlung'). - Right to terminate by notice (§ 918 ABGB).	+
BE	The Civil Code follows the hierarchy of the Directive.	+
DE	Hierarchy of remedies in place.	+
EE	Hierarchy of remedies in place.	+
ES	According to Sections 119.1 and 121 TRLGDCU, there is a hierarchy of remedies. The termination of a contract is not possible in the case of minor faults. Furthermore, Spanish Civil Code and case law make a clear difference between minor faults that give rise to a reduction of price and greater faults that entitle the purchaser to terminate the contract. If a termination of contract is not accepted by the business, the consumer must ask the court to declare it (case law is not always unanimous as far as how termination of contract due to non compliance of the other party must be executed. However most courts will require a court's decision if termination is contested).	+
FI	There is a hierarchy of remedies. Consumer Protection Act Chapter 5 Section 9 — Cancellation of the contract: (1) The buyer may cancel the contract on account of the seller's delay if the breach of contract is essential. Chapter 5 Section 19 — Reduction of price and cancellation of contract If rectification of the defect or the delivery of a non-defective good is not possible or if it has not been performed (…) the buyer shall have the right to: (1) demand a price reduction proportionate to the defect; or (2) cancel the contract, except if the defect is of minor significance.	+
FR	If the consumer makes a claim under the legal warranty provided by the Consumer Code (Art. L 211-1 et seq.), he shall be faced with a hierarchy of remedies: he must first settle for repair or replacement, and if such remedies are impossible, he may terminate the contract (return the goods	=

	and obtain restitution of the price) or obtain a price reduction while keeping the goods. Art. L 211-10 of the Consumer Code provides a delay between consumer demand and the resolution: if the repair or replacement cannot be implemented within one month following the claim of the buyer, he may rescind the contract. In addition, termination may be required if the repair or replacement of a specific good may give rise to a major damage to the consumer. In any case the right of termination cannot be performed in case the lack of conformity is minor. However, under the general provision of the Civil Code (Art. 1641 s), there is no hierarchy of rights (right to rescind the contract immediately).	
HU	In general, under Art. 306 (1) and (2) of the Civil Code there is a hierarchy of remedies (repair, replacement, price reduction and termination of the contract). Consumers may, in the first place, be entitled to choose either repair or replacement unless this is impossible or it results in disproportionate expenses on the part of the seller as compared to the alternative remedy, taking into account the value the goods would have if there had been no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the consumer. Any repair or replacement must be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods. If the consumer is entitled to neither repair nor replacement or if the seller refuses to provide repair or replacement or is unable to meet the conditions mentioned above, the consumer may require an appropriate reduction of the price or have the contract terminated.	+
IE	Ireland has a hierarchy of remedies: Regulation 7(2) and 7(3) EC Sales Regulations 2003 (repair or replacement first; then reduction of price or rescission of the contract).	+
IT	If the consumer claims the legal guarantee of conformity provided by the Consumer Code (Art. 128 seq.), he shall be faced with a hierarchy of remedies: He must first settle for repair or replacement, and if such remedies are impossible, he may obtain restitution. Art. 130, par. 7 of the Consumer Code provides three different cases in which the consumer can demand the termination of the contract: 1) if repair or replacement are impossible or disproportionate 2) if the seller has not completed the remedy within a reasonable time or replaced the goods within the appropriate time 3) if the replacement or repair carried out previously caused significant inconvenience to the consumer. In any case the right of termination cannot be performed in case the lack of conformity is minor (Art. 130, par. 10).	+
LU	Luxembourgish law has a hierarchy fixed by Directive 1999/44 but contains one addition, namely that the repair or replacement of the goods is done within 1 month. Afterwards, the consumer is entitled to rescind the contract or claim a price reduction (Art. L.212-5 Code consommation). However, under the general provision of the Civil Code (Art. 1641 s), there is no hierarchy of rights (right to rescind the contract immediately).	=
MT	Art. 74 of the Consumer Affairs Act provide a hierarchy (repair or replacement first; reduction of price or rescission of the contract).	+

NL	Under Dutch law, there is a hierarchy: buyers are generally obliged to first ask for the faulty product to be repaired / replaced (7:21 BW). Among the secondary remedies (termination of the contract, reduction of price), however, no hierarchy exists.	+
PT	There is no hierarchy of remedies (Art. 4 Decree-Law 67/2003).	=
PL	There is a hierarchy of remedies: buyers are generally obliged to first ask for the faulty product to be repaired/replaced. For secondary remedies, the buyer can require an appropriate reduction of the price or the contract to be rescinded, unless the lack of conformity in the latter is minor. (Art. 8 of Ustawa z dn. 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej). In Polish law specific performance remains the primary content of the obligation. Although there is no special provision, the principle of specific performance was strongly emphasised. However, currently, one can observe that importance of specific performance has decreased.	+
RO	Under Romanian consumer protection legislation, when products do not conform to the contract, consumers can choose among their reparation or replacement unless one of these options is impossible objectively or disproportionate. Reduction of price and termination of contract will be used when consumers cannot ask for reparation or replacement or when they have not been satisfied in a reasonable period of time or without inconvenience for consumers.	+
UK	A hierarchy of remedies is in place (complying with Directive 1999/44), but these provisions operate alongside the existing rules which i.e. grant a consumer a right to terminate the contract if he does so within a reasonable period of delivery (consumers have the choice between invoking remedies under the national legislation transposing Art. 3 Dir. 99/44 or to rely on the remedies available under general sale of goods legislation).	+

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	Consumer prices may rise in particular for complex products with a high failure rate.
Benefits for consumers	Consumer protection would be increased in the EU countries where at present less favourable rules on the order of remedies are in place (i.e. AT, BE, DE, EE, ES, FI, HU, IE, IT, LU, MT, NL, PL, RO). The study on 'sales remedies'[434] shows that the preferred order of remedies is influenced by the type of product, as well as its age. For consumable items including foodstuffs, clothes, shoes, accessories and cosmetics as well as smaller durable items such as CDs, DVDs, games, mp3 players and jewellery, most respondents would like to be offered sales remedies in the following order: replacement then termination of the contract. In some instances consumers may opt for a termination as the first option, especially in situations where they have lost trust in a brand, product or the seller. For recently purchased (less than 6 months ago) larger durable items such as cars, large home appliances and furniture, most respondents would like to be offered sales remedies in the following order: replacement, repair, termination. If the larger durable item has already been used for 'a while', consumers would accept the order: repair,

434 EB Qualitative study on sales remedies, December 2009 http://ec.europa.eu/consumers/rights/docs/aggregate%20report_dec2009_en.pdf

	replacement, termination. Where items have been purchased cross-border, the order in which consumers would like to be offered sales remedies remains largely the same as for domestic purchases. However consumers appear to be more likely to think carefully about whether or not replacement is worth the trouble and possible cost involved in returning the product. As a result, the number of consumers opting for a refund in the case of cross-border purchases tends to be higher. Consumer confidence would increase significantly in particular in countries where at present 'the hierarchy of remedies' is in place (e.g. AT, BE, DE, EE, ES, FI, HU, IE, IT, LU, MT, NL, PL, RO). The boost in confidence would result not only in an effective increase in the level of protection but also from having uniform rules across the EU. Consumers losing their trust in a trader would have the opportunity to terminate the contract, while potentially also benefiting from having the opportunity to use the refund for a better and/or cheaper alternative available on the market.
Costs and benefits for businesses	
Costs for businesses	The cost to businesses in the Member States currently employing a two-level structure (hierarchy of remedies) could increase slightly, due to increased requests from consumers to rescind the contract and refund the price. In case of refund after termination of the contract, the loss is the sale price (plus returns handling) minus the remaining value of the good returned. The loss in case of replacement is considered to be the production cost of the replacement good concerned (plus returns management) minus the remaining value of the goods returned. However, for certain goods e.g. cars, where the value of a new car diminishes significantly on the first day of use, the loss in case of replacement could be also significant. As confirmed by the study on sales remedies consumers are aware that the need to offer sales remedies has implications for traders and there was recognition that, in some instances, repair is the 'fairer' option for the trader. Hence, it is likely that consumers would continue to ask for a replacement of consumable goods and replacement or repair in case of larger durable goods and therefore minimise the potential burden on businesses compared to the baseline scenario. SMEs which currently rely on (multiple) repair can be more disadvantaged and may be more cautious to sell abroad using a European Common Sales , as distance consumers might be more likely to ask for a termination of the contract resulting in a refund (not accepting the inconvenience of lengthy repairs or waiting for a replacement).
Benefits for businesses	Retailers would benefit from increased consumer confidence.

Digital content products

Issue:

Digital content products are excluded from the scope of the Sale of Consumer Goods and Guarantees Directive. The CRD however covers digital content products. It should be noted nevertheless, that the material scope of the Directive will be limited to withdrawal rights and pre-contractual information obligations.

The European Commission conducted a study called 'Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers - LOT 1.'[435] The objective of the study was to provide an evidence-based analysis of:

435 Not yet published.

- the possible problems consumers are experiencing with digital services; and
- the cause of these problems.

The study shows the growing popularity of digital content products, problems suffered by consumers and related detriment. The combined value of financial losses and the value of lost time resulting from problems encountered in the previous 12 months with the digital content services was estimated at approximately €64 billion for the online population in the EU27. The financial loss and value of lost time across the eight digital product types examined ranged between €1 billion and €23 billion. The box below shows the key data from the study.

Usage of digital content products
From the eight digital product types covered in the survey (email, music, social networking sites (SNS), anti-virus software (AVS), games, positioning and navigation services (PNS), e-learning and ringtones) email music and SNS are the most popular product types used (93%, 79% and 67% respectively).
Games and anti-virus software, while not as popular as email, music and SNA, were still relatively popular with approximately 60% of respondents citing that they had used these products over the previous 12 months. E-learning and ringtones were the least popular with only 12% to14% of people using these types of products.

Occurrence of problems
While most people (57% to 71%) had not experienced a problem over the last 12 months, up to 36% of users of the eight products had. The actual figures, may be higher as 8% to 9% of respondents did not know or were unable to recall whether they had had a problem or not.

Type of problems
Overall, access was by far the most common type of problem experienced followed by lack of information and unclear/complex information. Access problems were most common for email, lack of information problems were most common for ringtones, while unclear/complex information problems were much more evenly spread across service type. The proportion of problems that related to privacy (0% to 4%) and unfair terms and conditions (1% to 6%) was the smallest across all service types.

Of the information respondents expect to receive, ‘user instructions’ and ‘terms of use’ were the most common across all service types. These were also the two types of information in which the gap between expectations and outcomes (i.e. what was actually received) were the smallest. Even in these cases, however, up to a third of respondents across service types did not have their expectations realised.

Impacts of problems
The most dominant types of impacts experienced as a result of the problems encountered were anger, annoyance, loss of time and inconvenience. The proportion of respondents that suffered a financial loss was small compared with the other types of impacts suffered (2% to 5%). Ringtones were the exception, as a much higher proportion of problems with that service type resulted in a financial loss (18%).

Although problems associated with ringtones were those most likely to have resulted in financial loss, the actual value of the financial losses per person from problems experienced with this service was the lowest across the service types (on average €87 per person/problem that resulted in a financial loss), particularly when compared to email and SNS (average from €519 to €563). Time lost in addressing problems tended to be much larger for problems related to email, antivirus software and ringtones and more generally for digital services accessed through CD/DVD/blu-ray and TV.

For those that had experienced problems, only a very small minority (i.e. up to 6%) had received compensation, financial or otherwise.

Consumer detriment

The consumer detriment for digital content products was estimated at approximately €64 billion for the online population in the EU27. The financial loss and value of lost time across the eight individual services ranged between €1 billion and €23 billion with the highest detriment for e-mails, followed by music and social networking sites.

Service type	Gross loss (€m)
Music	9,952
Games	7,850
SNS	8,631
Ringtones	2,224
Email	23,276
AVS	7,578
PNS	3,700
E-learning	1,244
Total for the EU 27	**64,454**

The most detrimental type of problem was the lack of information which accounted for one third of the total consumer detriment with digital products (€18.7 billion), followed by unclear/ complex information (€15 billion) and access (€10 billion).

Service type	Value of lost time (€m)
Lack of information	18,775
Unclear/ complex information	15,042
Quality	7,498
Access	10,273
Unfair terms and conditions	1,969
Privacy	376
Security	9,277
Total for the EU 27	**63.211**

The scale of the problem with digital services has also been confirmed by ECC-NET which receives numerous consumer complaints about the sector concerning functionality, safety and user rights.

The European Consumer Centres have indicated that the main areas of concern regarding the digital market in 2008 and 2009 were the following:[436]

Intellectual property and copyright

The legitimate use, copying and distribution of intellectual property and copyrights appeared to be one of the most problematic issues for consumers. Traders very often tend to apply overly restrictive

436 http://www.consumenteninformatiepunt.nl/bin/binaries/13-102-ecc_brochure2010-final-lage-resolutie--2-.pdf

provisions in contract terms when it comes to the regulation of legitimate copying and/or playing of the digital content to be purchased.

Unclear information provided to consumers
One cause of cross-border consumer disputes when purchasing digital content is very often unclear or lacking information on terms and conditions, price, withdrawal or contact information for the traders.

Withdrawal based on the regulations regarding distance-selling
While regulations for distance selling allow consumers a cooling-off period during which they can withdraw from the contract, traders may seek to restrict consumers' withdrawal rights when purchasing digital content.

Privacy- and data protection of consumers
There are an increasing number of problems related to the privacy and data protection of consumers in the digital world. The ability to protect, particularly from third parties, the information one reveals on the internet is a growing area of concern. The general experience is that consumers tend to be less cautious when giving out their personal data (for example when registering on websites), but then object to the unauthorised usage of their personal data.

Non-functioning digital content/ Digital content restricted to some hardware
The problem is that it is unclear what, if any, remedies are available to consumers in cases of non functioning digital content products. Traders at times restrict the usage of digital content contrary to the consumers' expectations. In other words, some business models restrict the usage of digital content to specific hardware.

Given the problems mentioned above, digital content products could be included in the scope of a European Common Sales and could provide for issues included by the legislator in the fully harmonised CRD and in addition for instance
Coverage of 'cost-free' products; a Common European Sales Lawcould cover digital content products not only those which are offered for remuneration, but also those which are 'cost-free'. In practice, this means that the consumer will have the same remedies whether he gives remuneration in exchange for a digital content products, or some other benefit (such as personal data).

Sales remedies for digital content products; clear rights to consumers in case a digital content product is defective, irrespective of the way it has been supplied (online or for instance by means of a CD or DVD). If a European Common Sales also covered the sales of digital products, the classification under service or sales contracts in certain national laws would not be relevant.

Conformity in long-term contracts; insofar as the digital content is not provided on a one-time permanent basis, the trader must ensure that the digital content remains in conformity with the contract throughout the contract period. This is relevant for example where updates of software contain bugs. This provision ensures that the consumer has a right to remedies for non performance for each defective update.

The analysis of the above provisions is provided separately:

'Cost-free' products

Legal comparison:

Country	Provision comparison	Impact on the level of consumer protection
DE	There is no specific consumer law pertaining to digital content products German courts have applied sales law to digital products. According to § 480 of the Civil Code the provisions on sales apply to barter as well.	+
FR	There is no specific provision on cost-free products in French law.	+
HU	At present there is no such regulation in Hungary. Currently it is only possible to act against a cost-free product provider if the product has caused damage.	+
IT	There is no specific provision on cost-free products in Italian law. The consumer sales law protection cannot be invoked for cost-free products.	+
NL	Art. 7:1 BW defines sales in relation to a price in money but also apply to barter (Art. 7:50 BW), thus in case of any other benefit than payment.	+
PL	The Consumer Sales Act applies only to the sale of tangible goods between a professional seller and a consumer (Art. 1 of Ustawa o szczegolnych warunkach sprzedazy konsumenckiej). The provision has to be interpreted strictly; it does not apply to other (non-sale) contracts on the basis of which the consumer becomes an owner of a good or to sale contracts of digital content products. Contracts that have no monetary consideration but where the parties exchange one service or privilege for another (barter) are not defined in the Civil Code.	+

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	Consumers may be adversely affected by a decrease in the number of 'cost-free' products available on the market.
Benefits for consumers	At present, in most Member States there are no specific provisions for 'cost- free' products (DE, FR, IT, PL) and the consumer sales law cannot be invoked for 'cost-free' products as the law applies only to tangible goods or there is no monetary value of the product. The provision would result in an increase in consumer protection as the consumer would be entitled to certain rights, for instance in case of lack of conformity. According to ECC-NET (2010)[437], there are numerous consumer complaints about 'cost-free' products. The 'free' product might also contain dangerous bugs that can damage a consumer's hardware. In such a case, a consumer would be able to seek remedies asking for compensation.
Costs and benefits for businesses	
Costs for	Businesses providing 'cost-free' products would have additional costs as at present

437 http://www.consumenteninformatiepunt.nl/bin/binaries/13-102-ecc_brochure2010-final-lage-resolutie--2-.pdf

businesses	there are no obligations to provide remedies in cases of defective 'cost-free' products. An increase in costs associated with offering 'cost-free' digital products could lead to a decrease in the number of 'cost-free' product providers especially in small countries where the market is not large enough to provide profits from other sources (media, advertisement).
Benefits for businesses	Retailers would benefit from the increased consumer confidence. More consumers could download 'cost-free' products and as a result businesses would increase their profits (e.g. advertisements linked with cost- free products).

Sales remedies for digital content products

Issue:

The current *acquis* does not deal with the rights of a buyer if a digital product contains a defect. One of the reasons is the uncertainty regarding the qualification of contracts concerning digital content products. Depending on the national laws and the circumstances of a case, those contracts might be qualified as a contract of sale or a service contract.

Most legal systems apply rules on consumer sales law in the case where a consumer purchases a piece of software on a DVD and the DVD fails to function in his computer as a consequence of a defect in the software on the DVD. However, this is not the case for instance in Finland and in Scotland, and it is still uncertain in France. In the scenario where the software was downloaded through an online (automated) update service or a real-time (remote) software support service, the contract is most likely classified as a sales contract for instance in Germany, Italy and in the UK, but as a service contract in other countries (e.g. Finland). For instance in Hungary and Spain, the contract will possibly be classified as a service contract, but sales rules may be applied by way of analogy. In any case, in many of the national legal systems, the classification of the contract – and thus the question of which legal rules apply to the contract – is far from settled.

Under most legal systems, irrespective of the classification of the contract, the remedies of repair and replacement, termination and price reduction are available to the dissatisfied consumer, as well as a claim for damages. In most of these legal systems, the hierarchy of these remedies stemming from the Consumer Sales Directive applies as well, with the exception of France (in so far as remedies under general contract law may be applied), Italy (with regard to tailor-made software) and Poland. In the UK, only the remedies of termination and damages are available if the contract is not classified as a consumer sales contract. If the contract may be classified as a consumer sales contract, the consumer may also resort to the regime of the *vices cachés* (hidden defects) in France or to the right to reject the 'goods' in the UK.

A possible European Common European Sales Law could provide clear rights to consumers if a digital content product is defective, irrespective of the way it has been supplied (online or for instance by means of a CD or DVD). If a European Common Sales also covered the sales of digital products, the classification under service or sales contract in certain national laws would not be relevant.

Legal comparison:

Country	**Provision comparison**	**Impact on the level of consumer protection**

DE	No specific consumer law pertaining to digital content services has been developed in Germany. German courts have applied sales law to digital products on hardware since the mid-1980s and Germany has, in principle, extended the sales law to contracts concerning the sale of other than movable tangible products, such as intangible products, in 2002. Thus, the sale of software comes under sales law – if the contract is a sales contract and not any different type of contract, such as a contract on works and services, a licensing contract or a rental contract. According to § 435 BGB the provisions on the purchase of goods apply with the necessary modifications to the purchase of rights and other objects. This was explicitly meant to apply to software in tangible form, i.e. on a computer or a CD ROM, amongst others. For software that was transmitted online, courts have applied sales law in many instances with certain modifications. However, the scope of application of the specific consumer sales rules has been restricted to 'tangible movable items'. Despite this, some legal doctrine sources endorse its application to the online purchase of software. In case of defectiveness of the software on a CD/DVD a consumer can take recourse to consumer sales law. When the defective software was transmitted online the contract will be treated in accordance with the rules for contracts for the sale of goods. Thus, the rules on conformity and the remedies of the Consumer Sales Directive 1999/44/EC apply. The German legislator has maintained the hierarchy of remedies as provided for in Art. 3 of the Directive. However, case law as to whether the rules of §§ 474 ff. BGB that are reserved to consumer sales contracts and which are mandatory and contain some specific provisions, e.g. the reversal of the burden of proof, apply, is not yet available. In case of non-performance the normal remedies of the general law of obligations apply. The purchaser may rescind the contract after having set a reasonable additional period for performance (§ 323 para. 1 BGB) or claim damages (§ 280 para. 1 BGB). He can also do both: rescind the contract and claim damages (see § 325 BGB). The hierarchy of consumer sales law does not apply since the consumer sales law remedies do not apply to non-performance.	+
ES	Except in some very particular cases (e.g. Art. 102 TR-LGDCU, LSSICE), Spanish legislation does not have any specific rules governing digital content services. The provisions of the Civil Code may be applied to a contract for services (e.g. the provision of information services), contract for work (services of streaming, video on demand, etc.), lease of goods and sale contracts. The same can be said of the sale of consumer goods (Arts. 114-127 TR-LGDCU), especially considering the broad definition of 'product' adopted in Art. 6 TR-LGDCU of 2007 (movable good or chattel in the general sense of Art. 335 CC. and not just a 'tangible movable item' of Directive 99/44/EC), although the question is disputed. Also applicable are the TRLPI provisions of intellectual property in relation to the user license (music downloads, video software, and any other digital content susceptible to being filed on durable medium, etc.). Software and hardware on a CD or DVD are independent items from each other, but constitute a single asset or product (never a service). Despite this, its acquisition will not be treated as an instance of sale,	+

	but as a licensing agreement for a non-customised use of a computer program, as the real property of the whole is not acquired. The license terms will govern the rights and duties of the user and, as for the topics not foreseen in the contract terms, the general provisions of the Civil Code regarding contracts will apply. In relation to the existence of any software malfunctioning as a consequence of an error not attributable to the hardware or medium (CD, DVD), the provisions on the contract of sale will not be applied but a series of regulations that are not just applicable to this (mainly the TR-LGDCU in relation to the liability for defective products and in relation to lack of conformity), but also to any form of distribution of market assets (including the licensing contract for use of software). The same applies when software is transmitted online. In accordance with the provisions in Art. 119 TRLGDCU the consumer may claim specific performance. Such a remedy, regulated by Arts. 119 and 120 TRLGCU will enable consumers to choose between repair and replacement of the product provided that the choice is not impossible or disproportionate. Furthermore, if the seller refuses to abide by the consumer requirement, the latter may exercise the corresponding remedies through a third party at their own expense. In cases where after repair or replacement the digital content does not function properly, the consumer may choose (Art. 121 TR-LGDCU), between termination or a price reduction of the product. Moreover, under (Art. 117 TR-LGDCU) the consumer may use the civil law legislation (specifically Arts. 1101 of the Civil Code. and related provisions) in order to obtain damages. Under general contract law, there is no hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service. In the case of synallagmatic obligations (Art. 1124 of the Civil Code), the consumer may choose between specific performance and termination of the contract, with compensation for damages and payment of interests in both cases.	
FI	In Finland no specific consumer protection rules pertaining to digital content services exist. The provisions on consumer sales, included in the Consumer Protection Act (Chapter 5, Sale of Consumer Goods, 16/1994), apply to the sale of goods: services fall outside this Chapter and therefore cannot apply directly to digital content services. The physical platform (CD/DVD) can be regarded as goods but the main subject matter of the purchase is treated as a service. If the CD fails to function because of defective software the consumer sales provisions cannot be applied. Instead the provisions of the EULA (End-User License Agreement) will be applicable as far as they cannot be regarded as unfair. In Finland no specific remedies of non-performance have been developed in relation to digital content services. This issue has not been discussed in the literature and there is no relevant case law in relation to this issue. A specific hierarchy between the remedies in the case of non-performance of digital content services has not been developed in Finland. If digital content services were classified as goods (which is not the case in Finland), the hierarchy of remedies indicated in the Consumer Sales Directive would apply.	+

FR	In French law, the qualification of a contract determines the legal regime which is applicable. The qualification of the purchase of a CD or DVD containing software is not envisaged by French law, and case law as well as legal doctrine diverge on the matter. Some decisions and authors consider the operation to be a sales contract, while others see it as a variant of a contract of hiring, and yet others consider it to be a sui generis operation. As for the purchase of software on material support, the question of the purchase of software through purely immaterial means has not been envisaged by French law. If the contract is qualified as a sales contract, the buyer has several legal actions available under sales contract law and consumer sales law in case of a defect of the sold product. The legal actions are available for consumers who buy software on a CD or DVD. When the software is downloaded, the buyer can take the above mentioned actions as well as additional ones (general sales law, automatic liability in e-commerce contracts and, if he is a consumer, the automatic liability in distance contracts): - Sales contract law; claim for non conformity: Arts. 1603 et seq of the French Civil Code require the seller to deliver a product which conforms to what has been agreed upon contractually and is exempt of any apparent defects. If this is not the case, the seller will be considered to have violated his obligation of conformed delivery. The buyer will have all the remedies in general contract law for non-performance. - Warranty against hidden defects: Arts. 1641 et seq of the Civil Code protects the buyer against a hidden defect in the good provided three conditions are met: 1) the defect must be hidden, 2) it must exist prior to the sale and 3) must render the good unfit for its normal use, insofar as the defect must be of a certain gravity. The buyer has an option between keeping the good and asking for a price reduction or returning the good and asking for a refund. If the seller knew of the defect, , he may owe damages to the buyer (the professional seller is irrefutably presumed to be of bad faith). - Automatic liability (responsabilité de plein droit) in e-commerce contracts: Art. 15, I of the LCEN foresees that any natural or legal person offers or guarantees at a distance and through electronic means the supply of goods or services, is automatically liable towards the buyer for the correct execution of the obligations resulting from the contract. - Consumer sales law: Legal warranty of conformity. This warranty only applies to tangible goods. It is thus improbable it would apply to defect in software. When software is placed on a CD or DVD, French case law distinguishes between the sale of the support and the sale of the software. If Arts. L. 211-1 et seq. of the Consumer Code are strictly applied, it is necessary to determine if the defect is due to the support or to the software. As the support is a tangible good, the legal warranty of conformity can be invoked. Conversely, if the defect is due to the software, the legal warranty of conformity should not be used. If the consumer makes a claim under his legal warranty, he shall be faced with a hierarchy of remedies: he must first settle for repair or replacement, and if such remedies are impossible, he main obtain	+

	restitution. - Automatic liability in distance contracts: Art. 15, II of the LCEN inserted two end paragraphs to Art. L. 121-20-3 of the Consumer Code to provide automatic liability of the professional towards the consumer. Its regime is almost identical to that of Art. 15, I, except it applies to distance contracts in general, and not only those concluded through electronic means. In general contract law in the case of non-performance, a party has several options: withhold performance, require specific performance or resolve the contract without prejudice of damages.	
HU	Hungarian law does not contain a specified 'digital content services' regulation. Software as a product protected by copyright law, cannot be sold, only a right of use can be acquired. The right to use and the special contract for use of copyright products are governed in the Act no. LXXVI of 1999 on Copyright (Copyright Act) and as a secondary rule, the Civil Code of Hungary, Act no. IV of 1959, as amended (Civil Code). If the software on the CD or DCD is faulty, it is a simple breach of contract, and the obligor, in this case the seller, who sold the CD /DVD is obliged to repair and replace or bound by other remedies under the general rules of the Civil Code. The European Consumer Sales Directive has been incorporated into the Hungarian contract law in such a way that the consumer protection provisions of the said Directive are applicable to a variety of contracts and are not limited to sale and purchase contracts. Due to this legislation, Hungarian contract law has an extensive consumer protection character which applies to all contracts entered into by consumers. Under the Civil Code, the subject of the consumer contract can be 'movable property' (chattel). However, the 'consumer contract' can be applied for other goods as well, including intangible assets. This view is supported by the former practice of the Supreme Court. Based on this legal regime, a software license agreement can also be considered as a consumer contract and the general rules on consumer contract of the Civil Code are applicable. No case has been published yet where a software licence agreement was qualified as a consumer contract. The method and way of the contracting does not challenge the qualification of the contract itself. Should the contract be entered into by an online update service or real-time software support service, this contract cannot be qualified as sale and purchase. If the software is defective the consumer may seek remedies under the general rules of the contract law (Civil Code). Irrespective of the special rules for consumer contracts, the remedies of the Civil Code can apply, as follows: repair or replacement; repair of the goods by the customer themselves or have the goods repaired by others at the expense of the obligor; price (fee) reduction; rescission from the contract; seeking damages, if any. Section 306 (5) states that any deviation from the law of the statutory guarantee (implied warranty) is null and void in consumer contracts which differs from the hierarchy of these rights. The list of the rights is a hierarchy, but the beneficiary has a right to select first between repair or replacement, after that he has a right to switch from the remedy he has selected to the alternative remedy. The costs of the switch shall be	+

	reimbursed by the obligor unless it was made necessary by the obligor's conduct or for other reasons (Section 306/A of the Civil Code).	
IT	No specific set of rules / specific remedies have been developed in Italy for contracts of digital services. Currently, on some occasions, the Civil Code section on Sales (Art. 1470 ff) will apply, on others the contract of Services (Appalto) rules (Art. 1650 ff). There is little case law, because these contracts mainly involve small transactions, which are most of the time settled out of court. The sale of software, according to courts, falls within the notion of a tangible good intended for the consumer. Therefore, the purchaser has to report the lack of conformity of the software within 2 months from the date of the discovery of the defect (Art. 1519 of the Civil Code, now in Title III of the Consumers' Code). This rule, however, should not apply where the object is the arrangement of some specific application software for the production of data bases. In such cases, there would be a tailored service which would be excluded from consumer regulation. The Court of Appeal of Rome has clarified, on the point, that the contract for the provision of electronic services shall be qualified as a contract of services (contratto di appalto), rather than sale of tangible goods, when the required services do not concern the transfer of a 'pre packaged' digital product, but rather the arrangement of a specific application software for the production of database therefore, being a provision of works, and not the transfer of a good already made according to standard procedures, Art. 1667.II of the Civil Code shall be applied, instead of Art. 1495 of the Civil Code. According to some legal scholars, reference should be made to the rules on lease contracts (1578-1579-1581 of the Civil Code), since the transfer of software is defined as a licence agreement. In this case, if at the moment of the delivery the leased good is affected by defects that considerably decrease the suitability for the use agreed upon, the consumer can request the cancellation of the contract or a reduction of the price, unless the consumer was aware or could have easily been aware of the defects. The provider has to compensate the lessee for the loss resulting from the defects of the good, unless he proves that he was not aware of the defects at the moment of delivery, without any fault on his part. The rules on e-commerce can be applied where the parties enter into a digital contract, which was concluded by means of contractual statements sent by electronic means and in a context of standardised negotiation (point and click modality). The software's failure due to defects or bugs will allow the consumer to invoke the consumer sales law protection. In a formalistic approach, sometimes adopted by a few Italian courts, the contract can be seen as a service contract but this would prevent the consumer to benefit from the more effective remedies of consumer law. Although at present there is no significant case law involving a consumer as a plaintiff, it is unlikely that in the future the courts will reduce the broad scope of consumer law protection. Under general contract law: the consumer can invoke the execution or the termination of the contract, as well as claim for damages (Art.	+

	1453 of the Civil Code). If the professional fails to fulfil his own obligations arising from the contract, the consumer can always refuse the fulfilment of his obligation.	
NL	No specific consumer or contract law regarding digital content services. In the case of standard software on a CD or DVD that is offered for sale in retail shops, consumer sales law is applicable, irrespective whether the failure to function is caused by a defect in the CD/DVD itself or by a defect in the software. This seems to be the prevailing opinion in legal doctrine. In a recent judgment, which questioned whether the producer of software could still invoke its copyright against the (professional) buyer of software, the District Court of Dordrecht confirmed this view by indicating that sales law applies to the contract whereby not only computers but (also) the (much more valuable) installed software were transferred. Others regard standard software contained on a CD or DVD as ‘rights’ Art. 3:6 BW. This implies that to such contracts, by virtue of Art. 7:47 BW, sales law is applied ‘to the extent that this conforms to the nature of the right’. There is no established authority indicating whether, if this view were followed, this would mean that the specific provisions on consumer sales law would or would not apply as mandatory law. According to a minority view in legal doctrine, contracts where standard software is contained on a CD or DVD cannot be considered as sales contracts because of the applicability of copyright law. In a recent judgment, the court of Appeal of Amsterdam, in a case in which the software failed to function properly as a consequence of a defect in the software, not in the CD/DVD itself, underlined (in accordance with the common opinion in the Netherlands) the fact that the software was not a good in the sense of Art. 3:2 BW. The court continued that sales law nevertheless applied by virtue of the provision of Art. 7:47 BW. However, as the case concerned two professional parties, the court was not asked whether or not the specific protective provisions of consumer sales law would apply. Where software is downloaded over the internet, sales law may only be applied by way of analogy or by qualifying the standard software as rights in the sense of Art. 3:6 BW, to which by virtue of Art. 7:47 BW sales law applies as well. In both these views, contracts concluded through distance selling would be qualified as sales contracts. However, a minority view in Dutch legal doctrine rejects the qualification of the purchase of standard software as a sales contract, which would imply that the contract would be qualified as a (specific type of) service contract, to which consumer sales law would not apply. If the contract could not be qualified as a sales contract, the question arises which type of service it is. It would seem that qualification as a contract for work (Art. 7:750 BW) is not possible, as that would require the creation of tangible work. However, if the digital content could be considered as tangible work, the contract would have been qualified as a sales contract. This implies that if sales law is not applicable to the contract, the contract for the supply of digital content would have to be qualified as a service contract in	+

	the sense of Art. 7:400 BW. The provisions that apply to such contracts, however, are largely of a default nature. If consumer sales law is applied by analogy to digital content services, Arts. 7:21 and 7:22 BW establish a hierarchy of remedies. According to Art. 7:21(1)(b) BW the consumer may claim that the digital content services must be repaired or according to Art. 7:21(1)(c) BW that the digital content service must be replaced. These claims only apply if the digital content service did not perform as it should have (in accordance with Art. 7:18 BW). Another option is dissolution of the contract in pursuance of Art. 7:22(1)(a) BW in situations in which the good is not in compliance with the contract. The ability to dissolve the contract only exists if repair or replacement is impossible (7:22(2) BW) and if dissolution of the contract is not disproportional (7:22(1)(a) BW). If the contract is not qualified as a sale of goods, but as a sale of rights under Art. 7:47 BW, it is not certain that the consumer sales provisions would be applicable. If this is not the case, the hierarchy of remedies, embodied in Art. 7:22(2) BW would not apply. If the contract is qualified as a service contract, the general contract law (Book 6 BW) provisions are applicable: a consumer has the right to compensation for damages that was caused by the non-performance of the service, unless the failure in performance cannot be attributed to the service provider (Art. 6:75 BW). Moreover, the consumer may terminate the contract if the failure of the digital content justifies such termination (Art. 6:265 BW).	
PL	There are no specific rules of consumer law established for digital content services in Poland. As far as specific rules of contract law are concerned there is the Law of 18 July 2002 on Provision of Services through Electronic Means (Ustawa o swiadczeniu uslug droga elektroniczna, Dz.U.02.144.1204) which implements the E-Commerce Directive in Poland. Consumer sales law application is limited by Art. 1 of the Law of 5 September 2002 on Special Conditions of the Consumer Sale (Ustawa o szczegolnych warunkach sprzedazy konsumenckiej, Dz.U.02.141.1176) pursuant to which this law applies only to sale of a tangible good (movables) between a professional seller and a consumer. In the Polish legal doctrine this provision has been interpreted strictly: the law should not be applied either to other (non-sale) contracts on the basis of which a consumer becomes an owner of a good or to sale contracts of intangible good (which means it could be applicable only to digital content saved/stored on a tangible good, like CD/DVD and then it would apply to the sale of that CD/DVD and not to the sale of the digital content). Therefore general contract law regulation of sales contracts would be applicable: Art. 535-581 of the Polish Civil Code (Kodeks cywilny) since it applies to the sale of either tangible or intangible goods as well as to the sale of rights. Moreover, some implemented provisions of the E-Commerce Directive and the Distance Selling Directive could be applicable to digital content service. Most legal scholars endorse that the purchase of software may be treated as a contract for the consumer sale of goods, if the software is contained on a tangible good (CD/DVD). However, in this case the CD/DVD is the subject of the sales contract and not the software itself. This means that the recourse to consumer sales law is	+

	unavailable, in case there is a defect in the software. Recourse may be made to general liability rules for faults in goods bought: Arts. 556-576 of the Civil Code, as well as to general rules on non-performance Art. 471 and sub from the Civil Code. In many cases, such a purchase of software will be combined with the purchase of license to exploit that software (service contract). The grounds for liability for faults in the software could then be found only in the contractual relationship between the parties. The defect of software which was transmitted online will not fall under the definition of consumer sales in Polish law which means that no recourse in consumer sales law will be available. The purchase of software may be treated as a contract for the sale of goods, however, in most cases, it will be combined with the purchase of license to exploit that software (service contract). The grounds for liability, in case the purchase of license is involved, could be found only in the contractual relationship between the parties. The legal character of such a purchase has not yet been clearly defined in Poland. Besides the concept of it being a sales contract, it might be declared a purchase of license, or a contract transferring ownership of a copy, or a contract of access. Presently it is unclear which rules actually are applied to digital content not stored on a DVD/CD.	
UK	In contracts for the sale or supply of goods, there are implied terms to the effect that if the goods are sold by description, they comply with the description; that they are of satisfactory quality; and that they are fit for any particular purpose expressly or implicitly made known. These are ‘strict liability' or ‘outcome based’ standards. In contracts for the supply of a service, there is an implied term that the supplier will carry out the service with ‘reasonable care and skill’. This is a ‘fault based’ standard. Where a consumer purchases a piece of software on a CD or a DVD: the basic legal nature of the supply is in question. A physical vector such as a CD or DVD is a good, and if such a vector (or any computer hardware) is supplied along with software under a single contract this has been held (in the English Court of Appeal) to be a contract for the sale of goods. If this is the case, then the statutory implied terms as to description, quality and fitness will apply. There is also equivalent Scottish authority to the effect that such a contract should not be viewed as one for the sale of goods; but, rather, as a contract sui generis. If this is the case, then the courts would use common law to imply similar outcome based standards to those that would be applicable under the SGA or SGSA. These would require the hardware and software package as a whole to be reasonably fit for its intended purpose. Such contracts do not seem to be viewed as service contracts (a classification that would cause the fault based standard from SGSA, s. 13 to apply). Whether or not such contracts are technically viewed as being for goods or as sui generis, outcome based standards seem to apply. Where a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service: there is a lack of certainty as to how judges will treat this question. Again, the basic legal nature of the supply is in question. Where the software has been transferred without any durable medium	+

	being involved, the definition of 'software' in a particular contract has been held to mean that goods are being supplied; although if the software is being licensed and not sold (as is typically the case) the contract would be viewed as one for the supply (rather than sale) of goods. This would mean that the (outcome based) statutory implied terms as to description, quality and fitness from SGSA, Part 1 would apply. At the same time, one view is that there is neither a sale nor a supply of goods in any case where only software is being supplied. This would mean that the statutory implied terms as to the description, quality and fitness of the goods would not apply. However, it does not seem that such a contract will necessarily be treated as being a contract for a service either. So, the fault based implied term as to reasonable care may not apply. Pure software contracts may be treated as contracts sui generis. This being the case, it is possible that the courts would imply similar outcome based implied terms to those applicable under the SGA or SGSA to goods; i.e. essentially to the effect that the software is reasonably capable of achieving its intended purpose. The above cases deal with business to business, not business to consumer contracts. It is very hard to predict exactly what will be decided in relation to the latter. There are no remedies specific to digital services. If the contract is qualified as a contract of sale of goods: the buyer will have a right for damages, termination as well as the remedies from the Sales Directive –with a hierarchy. UK law allows the consumer to choose between this package of remedies and the right to terminate the contract; although the right to terminate itself will be lost after a 'reasonable period of time', which tends to be a matter of a month or couple of months at the most. If the contract is one of supply of services or sui generis: only damages and termination are available. The termination remedy is only available where the breach is shown to be sufficiently serious.	

'+' means an increase, '-' means a reduction and '=' means no change in the level of consumer protection

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	Consumers might face an increase in prices as businesses could try to compensate the higher costs for remedies.
Benefits for consumers	Consumer certainty in relation to purchases of digital products would increase, as consumers would be certain that if a digital content product is defective, a seller would be obliged to offer remedies. The consumer detriment stemming from the problems related to the quality of digital content products has been estimated at €7.5bn and €10bn for problems concerning access to digital content products. A Common European Sales Law would increase consumer protection compared to many national laws, as it would offer a free choice of remedies for a defective digital product. Thus, a consumer could also choose between repair, replacement, termination and price reduction for digital products. As a result consumer detriment could be significantly reduced. A Common European Sales Law would ensure certainty in cross-border shopping, as well removing the hierarchy of remedies. Thus, the level of consumer protection under a Common European Sales Law would increase compared to the baseline

	scenario, for instance compared to the laws of DE, ES, FI, FR, HY, IT, NL, PL and the UK.
Costs and benefits for businesses	
Costs for businesses	Businesses would have to bear some additional costs as their customers would be able to freely choose the remedies they prefer which is not the case in most Member States at present. However, considering that national laws provide at least for certain types of remedies (with or without a specific hierarchy), the additional costs for business would only be limited to the difference in the cost of a given remedy, compared to another. For instance, the additional costs would only be the difference between the cost of a remedy that would otherwise apply under a given national law (e.g. replacement), as opposed to the cost of an alternative remedy that a consumer could choose under a European Common Sales (e.g. reimbursement of the cost). The costs would mostly affect companies who sell on average more defective products than their competitors, as the costs would only occur if the company sells a defective product.
Benefits for businesses	Businesses would gain legal certainty as to their obligations when selling digital content products. At present, depending on the national law and the circumstances, contracts for digital content products might be qualified as a contract of sale or a service contract. Moreover, businesses would be able to develop economies of scale, as they could sell their digital products to consumers across the EU, based on the same rules. Considering that digital products can easily be sold on the internet irrespective of national borders, the expansion of cross-border trade in digital products is likely to be even higher in a simplified legal environment where businesses could use a uniform contract law throughout the EU compared to the existing situation.

Conformity in long term contracts

<u>Legal comparison:</u>

Country	Provision comparison	Impact on the level of consumer protection
DE	No specific provision requiring the service provider to make after sales service available or to fix bugs or updates. The availability of updates is subject to the contractual agreement. Whether the seller gave a contractual warranty and is therefore liable for non-conformity depends on the interpretation of the contract in each single case. The jurisprudence often denies such an obligation (OLG Koblenz 6 U 268/08: no liability for software-update for camera by producer). It seems, however, that there is a time dimension to the conformity with the contract if the digital content cannot be used any more after an unduly short term (the non-conformity would lie in its lack of sustainability or flexibility (examples from DE case-law refer to the year 2000 or the introduction of the Euro – systems that could not cope with these changes were held not to be in conformity with the contract). The usual life cycle would be an indicator of the duration of an update obligation.	+
FR	This question is not specifically dealt with under French law. If there is an obligation of the trader to update, a lack of conformity can be claimed according to the general rules.	+

HU	There is no specific regulation at present, only on the level of General Terms and Conditions. Thus the agreement between the parties is the governing rule, there are three typical models of updating in contracts: 1. Regular safety updates for free. 2. Safety updates are free but other updates or developments are provided on payment. 3. Optional updates.	+
IT	This question is not specifically dealt with under Italian law. If there is an obligation for the trader to update, remedies for a lack of conformity can be claimed.	+
NL	No specific provision in Dutch law. General conformity requirements apply.	+
PL	No specific provisions exist obliging the service provider to make an after sales service available. If the consumer concludes a contract for having digital content service provided to him for an unlimited period of time, it may be assumed that out of the nature of the obligation would arise the obligation for the service provider to provide access to the digital content and its updates, when necessary. Although consumer sales are not applicable, rules of general contractual remedies apply (the general regime under Art. 471, Arts. 559, 568, 563 of the Civil Code.	+
UK	There is no legal right to after sales service; apart from what is provided for expressly in the contract or in any associated guarantee or extended warranty. It is in such express provisions of particular contracts that conditions relating to how long (and in what form) an after sales service will be available can be found. This would depend on how the courts interpreted and applied the 'durability' criterion that is relevant to the 'satisfactory quality' implied term applicable to goods; or how 'reasonable fitness for purpose' was interpreted (the implied term applicable if the contract was treated as *sui generis*); or what was expected in terms of 'reasonable care and skill' if the contract was treated as one for services. These various criteria provide a significant degree of flexibility and no case law exists on these issues.	+

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	Warranties are important for consumer protection in the case of digital products. Digital content products are excluded from the current EU consumer protection law as intangible products. A number of businesses are reported to make limitations and/or exclusions in their contract terms, especially regarding warranty disclaimers. At present, in most Member States (e.g. DE, FR, HU, IT, UK) there are no specific provisions obliging the trader to make an after sales service available and only the general rules and the specific contractual agreements apply. The provision of conformity with the long-term contract would therefore increase consumer rights as remedies could be sought by consumers through the whole duration of the contract.
Costs and benefits for businesses	
Costs for businesses	This provision does not involve a direct burden and cost but nevertheless might imply a burden for digital content providers. This burden would stem from the

	increased liability of digital content providers which as the result could increase the cost of after-sales services. However, contrary to tangible products, repair or replacement of digital products are not so costly.
Benefits for businesses	Retailers would benefit from increased consumer confidence in purchasing digital content products.

B2B TRANSACTIONS

Duty to disclose information about goods and services

Issue:

A European Common Sales could introduce a rule that before the conclusion of a B2B contract, the supplier would have a duty to disclose to the other business any information concerning the main characteristics of any good or service. Breach of the duty might, among other consequences, trigger liability for damages.

Legal comparison:

Country	Provision comparison	Impact on the level of protection
BE	There is not such a specific and clear provision. However: -The principle of good faith (Art. 1134.3 of the Civil Code) obliges contracting parties to cooperate loyally and to inform each other in good faith. When a party does respect these duties, the judge can decide that this contractual party has committed a contractual fault and is liable for the loss caused to the other party. - In addition the violation of the duty to inform can also lead to pre-contractual liability: e.g. when there is a defect of consent (fraud (1116 of the Civil Code) / mistake (1110 of the Civil Code)) the contract can be avoided or give rise to damages. As to fraud, there is no general duty to inform the other party (every contracting party has also a duty to inquire). Fraud by omission (to provide information) will not be easily accepted. Fraud by omission supposes the existence of a special duty to inform and the deliberate concealment of the information. A special duty to speak can be derived from special legislation (e.g. Art. 4 MPCPA or the prohibition in that Act, to mislead the consumer by omitting essential information, see Art. 90 MPCPA, in B2C relations), customs, the nature of the contract, the special circumstances of the contracting parties (e.g. professional expertise, the weakness of a contracting party), the trust that a contracting party creates, the circumstances of the preliminary negotiations and the obligation of loyalty (e.g. the duty to answer correctly on questions). In case of a mistake, the mistake must be 'excusable': there is only a mistake if a reasonable person in similar circumstances would have made the same mistake. The contract cannot be avoided if a contracting party is frivolous or negligent when contracting. Indeed, both contracting parties have a pre-contractual information duty: a contracting party has a duty to inform, but the party who made a mistake also has a duty to obtain information. If a pre-contractual breach takes place then the following sanctions are	+

	applicable: damages and voiding the contract.	
DE	There is no special provision. The general principle of good faith obliges to inform about unusual circumstances which the other party cannot expect and which are obviously important for the other party, especially when they concern the purpose of the contract. Breach of the duty may cause contractual liability for damages.	=
EE	- Estonian law has a general obligation to inform: LOA § 14. Pre-contractual negotiations (1) Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate. (2) Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest. There is no obligation to inform the other party of such circumstances of which the other party could not reasonably expect to be informed. - Obligation to inform derives also from the rules on mistake (GPCCA § 92 (3)): A person who entered into a transaction under the influence of a relevant mistake may cancel the transaction if: 1) the mistake was caused by circumstances disclosed by the other party to the transaction, or non-disclosure of circumstances by the other party if disclosure of the circumstances was required pursuant to the principle of good faith. 2) the other party knew or should have known of the mistake and leaving the mistaken party in error was contrary to the principle of good faith. 3) the other party to the transaction, entered into the transaction on the basis of the same erroneous circumstances, except if the other party could have presumed, having the correct perception of the circumstances, that the mistaken party would have entered into the transaction even if it had known about the mistake. - In assessing what kind of information should be delivered, in court practice GPCCA § 95 regarding 'Notification obligation' is often used: In order to ascertain whether circumstances are subject to disclosure to the other party (…), regard shall be had, in particular, to whether the circumstances are clearly important to the other party, to the specific expertise of the parties, the reasonable opportunities of the other party to obtain the necessary information and the extent of the necessary expenses to be made by the other party in order to obtain such information. Amongst other, damages and voiding the contract are remedies available under Estonian law.	=
ES	There is no specific provision for B2B transactions, but general rules on avoidance for a mistake and fraudulent omissions, and good faith, determine duties to disclose. However, the duties are much less precise.	+
FI	There is no such duty in B2B transactions. The Sale of Goods Act (355/1987), Section 18(1) provides that the goods are defective if they do not conform with information relating to their properties or use which was given by the seller when marketing the goods or otherwise before the conclusion of the contract and the information can be presumed to have had an effect on the contract.	+
FR	The jurisprudence has developed a general obligation of pre-contractual	+

	information (fraud/mistake/good faith) which varies according to the circumstances, the quality of the parties or the complexity of the product for instance.	
HU	Under Art. 205 (3) of the Civil Code, the parties must inform each other regarding all essential circumstances in relation to the proposed contract before the contract is concluded. Moreover, according to Art. 367 of the Civil Code, the seller must inform the buyer regarding the essential characteristics of the goods and all important requirements pertaining to the good, particularly any potential rights in connection with or any encumbrances on the good. The seller must also convey the documents concerning such circumstances, rights, or encumbrances to the buyer. Finally, the general duty of good faith is applicable also during the pre-contractual phase. As a result, a contract could be annulled, for example, if the party withholding information leads the other party to enter into the contract by mistake. However, the burden of proof lies on the party who allegedly made the mistake.	=
IT	There is no such rule under Italian law.	+
NL	There is no specific provision in Dutch law.	+
PL	***There is no general duty to provide the other party with information prior to the conclusion of a contract. In relation to specific contracts, according to Art. 546(1) of the Civil Code, a seller is obliged to inform a buyer about all necessary circumstances related to legal and factual aspects of the goods being sold. However, it is not certain in legal doctrine whether this obligation also covers pre-contractual duties. A party may also release itself from a contract entered into on grounds of a mistake (Art. 84 of the Civil Code) or fraud (Art. 86 of the Civil Code).***	+
PT	This duty is based on the general duty of good faith in pre-contractual relationships – Art. 227 para. 1 of the Civil Code. The remedies in general are damages.	=
UK	England and Wales: There is no direct general duty. However, businesses may have to disclose information on the characteristics of goods to avoid liability for non-conformity. Scotland: No such duty is directly imposed in the law of Scotland. However, there would sometimes be remedies via the rules on error or damages for fraud or negligent misrepresentation. Also information may have to be given to avoid liability for non-conformity.	+ +

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No costs for consumers.
Benefits for consumers	The provision does not have a direct impact on consumer wellbeing. Consumers might indirectly benefit of an increase in business competitiveness and productivity (addressed below).
Costs and benefits for businesses	
Costs for businesses	Businesses might incur administrative costs for providing information on their products. In this case, these costs are likely to be recurrent, as providing product information is a continuous activity. However, it could be expected that similar information is provided already in the usual

	course of businesses. The costs would affect mostly businesses involved in B2B transactions only. Those selling to consumers as well would have lower costs as they could use the same pre-contractual information with some adjustments if necessary both for their consumer and business customers.
Benefits for businesses	SMEs would benefit in relations with companies with greater market power, as this general disclosure duty and related remedies in case of a breach – which currently do not exist or only partially exist in most Member States (e.g. DE, ES, FI, FR, IT, NL, PL, UK) – would entitle them to information they otherwise may not have received from the other party and/or would not have been able to obtain in another way. By being better informed, they could strengthen their position in negotiations. In general, businesses would be in a better position to judge about the characteristics of the products they purchase in advance of concluding a deal. This information would enable them to select the products that mostly suit their needs. As this would result in a better allocation of resources, their productivity and competitiveness would increase.

Duty to ensure that information supplied is correct

Issue:

In addition to the general duty to disclose information about goods and services, a Common European Sales Law could introduce a duty for the party who supplies information before or at the time a contract is made, to take reasonable care to ensure that the information supplied is correct and is not misleading.

In case of breach of this duty the aggrieved party would have the following remedies:

- Where the business has not fulfilled his pre-contractual information duty and, as a result a contract has been concluded which the other party would not have concluded, or would not have concluded on the same terms, the business would be liable for damages.
- The contract may be void on the basis of a mistake or fraud provisions.

Legal comparison:

Country	Provision comparison	Impact on the level of protection
BE	There is not a specific provision. However: - The principle of good faith (Art. 1134,3 of the Civil Code) obliges contracting parties to loyal cooperation and to inform each other in good faith. When a party violates one of these duties, the judge can find that this party commits a contractual fault and is liable for loss caused to the other party. - In addition, the violation of the duty to inform can also lead to pre-contractual liability: e.g. when there is a defect of consent (fraud (1116 of the Civil Code)/ a mistake (1110 of the Civil Code)), the contract can be avoided and/or damages can be claimed. Especially where a party intentionally gives misleading or incorrect information there will often be fraud. In the case of fraud, four conditions must be fulfilled: (1) the use of	+

	artifices; (2) the fraud must be committed by the other contracting party; (3) the party that commits the fraud must have the intention to deceive or to mislead the other party and finally (4) the fraud must be of an overriding importance. Only when the latter condition is fulfilled, a fraud will (‘principal fraud’) lead to avoidance of the contract (at the request of the party that is victim of the fraud). If the fraud is not of an overriding importance and has not led the other party to enter into the contract (but could have led him or her only to enter into the contract under different conditions, e.g. a lower price) the fraud is 'incidental'. In the latter case only damages can be claimed, on the basis of a pre- contractual fault (tort liability: Art. 1382 of the Civil Code). The first condition will be fulfilled (artifices): If the information provided is incorrect, incomplete or misleading, (through lies, misleading declarations or overstatements); or If there is an omission to provide information, deceit will only be accepted if there is a special duty to inform and if the contracting party deliberately conceals this information. This special duty to disclose can result from special legislation (e.g. Art. 4 MPCPA). Whilst in B2C situations it is likely that an omission to give information constitute a fraud, it is less certain in B2B situations. The first condition of fraud will be fulfilled when the information provided is incorrect, incomplete or misleading. The condition that there must be an intention to deceive or to mislead the other party, makes the defect of consent 'fraud' less protective than the provision envisaged at the European level mentioned above. Under Belgian law the remedies for fraud consisting in not providing information that the other business party needed are limited to avoidance and damages.	
EE	Estonian Law of Obligations Act (1.07.2002) provides (§ 14. Pre-contractual negotiations): Persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall take reasonable account of one another’s interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate. There are no special remedies provided for in the Art. itself, but all remedies mentioned above are available (LOA § 101 (1)).	=
ES	There is no such specific provision. But general rules on avoidance for mistake, fraudulent omissions and good faith determine such a duty. However, the duty is much less precise. There is no specific provision for B2B transactions. The remedies based on general contract law would, however, be similar.	+ for the duty = for remedies
FI	No such provision in the Finnish law.	+
IT	No corresponding provision in Italian law – extreme cases are however dealt with by the general provision on good faith.	+
PL	There is no such special provision. There are no such remedies.	+
PT	This duty of care follows from the general duty of good faith – Art. 227 par. 1 of the Civil Code. The remedies in general are damages.	= for duty + for remedies
UK	England and Wales: the rules governing misrepresentation, including Misrepresentation Act 1967, section 2(1), apply in principle where there has been a misstatement of fact. Moreover, the courts are ready to find that	+

	a statement that literally may be true but which is misleading amounts to a false statement. Right to avoid if misrepresentation is serious; right to damages unless the person giving the incorrect information shows that he had reasonable grounds to believe that the information was correct. Scotland: no such duty is directly imposed in Scottish law. However, there are sometimes remedies via the rules on error or damages for fraud or negligent misrepresentation. Additionally, information may have to be given to avoid liability for non-conformity. No such comprehensive remedies in Scottish law.	+

Assessment of impacts

Costs for consumers	Consumers are unlikely to be concerned.
Benefits for consumers	Consumers are unlikely to be concerned.
Costs and benefits for businesses	
Costs for businesses	Some additional costs may be incurred by businesses to adapt the information materials to make sure that the information supplied is correct and is not misleading. In the case of breach of this duty i.e. where the business has not fulfilled his pre-contractual information duty and, as result a contract had been concluded which the other party would not have been concluded, or would not have been concluded on the same terms, the business would be liable for damages. The potential costs for compensating damages would however only affect traders providing incorrect or incomplete pre-contractual information to other parties. These costs are considered as minor as the required standard would correspond to normal business practice.
Benefits for businesses	Businesses would benefit from receiving complete and correct pre-contractual information that would facilitate the business decision making process. In a number of Member States at present there are no specific provisions concerning remedies for a breach of information obligations in B2B contracts (e.g. PL, FI) or the rules are not so clear and strict (e.g. PT, IT, UK). Businesses in these countries would be more protected in case they conclude a contract based on incomplete or misleading information.

Unfair exploitation

Issue:

A Common European Sales Law could introduce a provision that a party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

Legal comparison:

Country	**Provision comparison**	**Impact on the level of**

		protection
BE	There is not such an explicit provision under Belgian law. However legal literature and case law have developed the theory of the 'qualified unfair treatment' (gekwalificeerde benadeling/ lésion qualifiée) of a contract party. There are three cumulative requirements: 1) there must be a manifest imbalance between the obligations of the parties; 2) there must be an abuse of the concrete circumstances of the inferiority of the unfair treated contractual party (inferiority can be: physical, moral, financial, intellectual, functional, a monopoly, …) and 3) the abuse has to be the determining factor: without the abuse of circumstances the unfair treated party would not have concluded the contract or would have concluded a less onerous contract. The sanction under Belgian law is based on the culpa in contrahendo (Art. 1382 of the Civil Code) and damages will be awarded to the victim. Some scholars have submitted that redress in kind can consist out of nullifying the contract or reducing an overstated obligation. The text envisaged at European level as mentioned above provides for a clear provision.	+
EE	Regulation is based on nullity of the contract: GPCCA § 96. Transaction contrary to good morals or public order: (1) A transaction which is contrary to good morals or public order is void. (2) A transaction is contrary to good morals, inter alia, if a party knows or must know at the time of entry into the transaction that the other party enters into the transaction arising from his or her exceptional need, relationship of dependency, inexperience or other similar circumstances, and if: 1) the transaction has been entered into under conditions which are extremely unfavourable for the other party or 2) the value of mutual obligations arising for the parties is out of proportion contrary to good morals. (3) If the value of mutual obligations specified in paragraph (2) 2) above is unreasonably out of proportion contrary to good morals, it is presumed that the party knew or should have known of the other party's exceptional need, relationship of dependency, inexperience or other similar circumstances. (4) If a transaction is void due to the obligation to pay interest which is contrary to good morals, the party who is obliged to pay the interest or other charge depending on the time during which the loan is used, has the right to return that which is received as a result of the void transaction by the due date by which the party had, according to the void transaction, to repay the whole loan. In such a case, interest for the time during which the loan was used shall be paid in the amount provided for in subsection 94 (1) of the Law of Obligations Act.	=
ES	Under Spanish law, there is no general possibility of avoiding the contract for unfair advantage except: (i) there is duress; (ii) there is some quantitative disadvantage in very specific cases involving minors and similarly situated persons, and no other remedy is available; (iii) in certain Spanish regions - Cataluña, Navarra - where the traditional rescission by seller for laesio enormis is applicable.	+
FI	Section 31 in the Contracts Act: (1) If anyone, taking advantage of another's distress, lack of understanding, imprudence or position of dependence on him/her, has acquired or exacted a benefit which is obviously disproportionate to what he/she has given or promised, or for which there is to be no consideration, the transaction thus effected shall	=

	not bind the party so abused.	
IT	Under Art. 1448 of the Civil Code the party is entitled to avoid the contract when there are specific conditions such as: a) 'ultra dimidium' disproportion among the reciprocal obligations; b) the party had urgent needs; c) the other party exploited the first party's situation by taking an excessive benefit or unfair advantage. No judicial revision of the agreement is allowed by the court.	+
PL	Under Art. 388 of the Civil Code in a case of unfair exploitation, a party may demand a reduction of its own performance or an increase in the performance due to it and in the event that one or the other would be excessively difficult, it may demand that the contract be declared invalid. There is no possibility to avoid contract by notice of the entitled party.	+
PT	The same remedy is foreseen in Art. 282 of the Civil Code.	=
UK	England and Wales: Where the parties are in a relationship of trust and confidence, remedies (for 'undue influence') are readily given. In other cases there is the possibility that the contract may be avoided as an unconscionable bargain, but the cases are few. Scotland: No such express rule exists, but in some cases a contract may be avoided on the ground of 'facility and circumvention' or undue influence. 'Facility' here means mental weakness. Cases are few.	+ +

Assessment of impacts

Costs for consumers	Consumers are unlikely to be concerned.
Benefits for consumers	Consumers are unlikely to be concerned.
Costs and benefits for businesses	
Costs for businesses	Businesses which exploit the other party's situation by taking an excessive benefit or unfair advantage would need to change their businesses practices. In the case of unfair exploitation the other party could avoid the contract and this may generate some costs for the exploiting party. However, these costs are considered as minor as the required standard would correspond to normal business practice.
Benefits for businesses	At present, in a number of Member States, the rules are less strict i.e. not provide for the same remedies or provide for less cases of unfair exploitation (e.g. ES, PT, PL, UK). Businesses in these countries would benefit from more protection against unfair exploitation. SMEs are likely to benefit particularly from this provision as they are often the weaker party and are more likely to fall victim of unfair exploitation.

Unfairness control of standard terms

Issue:

A Common European Sales Law could introduce a rule that in B2B transactions, a business cannot rely on a contract term included in its standard terms and conditions which grossly deviates from good commercial practice, contrary to good faith and fair dealing. (i.e. unfair term). This rule means

that not individually negotiated unfair standard terms and conditions shall be fair, otherwise that term cannot be enforced.

Legal comparison:

Country	Provision comparison	Impact on the level of protection
BE	There is no such provision under Belgian law.	+
DE	The general provision on the reasonableness of unfair terms is also applicable to B2B transactions. According to this, provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may arise from the provision not being clear and comprehensible. Unreasonableness is, in case of doubt, to be assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates, or if it limits essential rights or duties inherent in the nature of the contract to such an extent that the purpose of the contract is jeopardised. To interpret that rule the courts take into account the black and grey lists from B2C legislation, as an overall grey list for B2B contracts.	=
EE	A standard term is void if, taking into account the nature, contents and manner of entry into the contract, the interests of the parties and other material circumstances, the term causes unfair harm to the other party particularly if it causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the other party or if the standard term is contrary to good morals.	+
ES	No such provision for B2B transactions.	+
FI	No such general provision in Finnish law. But under certain circumstances contract terms may be considered as unfair (e.g. Supreme Court 2008:53).	+
FR	Under Art. L 442-6 of the Commercial Code (introduced in 2008) any professional engages his liability and requires him to repair the damage caused by the fact that he: - submits or attempts to submit a trading partner to obligations which create a significant imbalance in rights and obligations of the parties - obtains or attempts to obtain undue or disproportionate benefits from a trading partner. Moreover, Art. L.132-1 of the Consumer Code contains a reference to a 'non-professional' which might lead, under certain circumstances, to the application of the unfair terms control of the Consumer Code to relations between businesses.	+
HU	There is no such specific provision in the national law. However, Art. 205/B (2) of the Civil Code provides that the other party shall be explicitly informed of any standard terms that differ substantially from the usual contract conditions, the regulations pertaining to contracts, or any stipulations previously applied by the same parties. Such conditions shall only become part of the contract if, upon receiving special notification, the	+

	other party has explicitly accepted it. This is mandatory for B2B contracts.	
IT	No corresponding provision in Italian law.	+
NL	Standard terms can be nullified if they are unreasonably burdensome: Art. 6: 233 BW- of the Dutch Civil Code. The fairness control in Dutch law provides a similar protection.	=
PL	***There is no such specific provision in Polish law***	+
PT	Terms not individually negotiated are unfair if they are contrary to good faith – Art. 15 of the Decree-Law 446/85 –in B2B as well as in B2C. There are also black and grey lists of terms specifically for B2B.	=
UK	There is no unfairness control, unless the term was an exclusion or limitation of liability clause, void under UCTA 1977. Apart from penalty clauses, there is currently no control over other unfair terms in B2B contracts, but the Law Commissions have recommended Unfair Terms Directive-like controls over small business contracts. The Government has accepted the recommendation but nothing has been implemented in law.	+

Assessment of impacts

Costs and benefits for consumers	
Costs for consumers	No direct costs. There is a potential risk that businesses that use unfair terms will pass on the costs of adjustment to consumers. However, this risk is low in a competitive market. Moreover, many of the businesses may be engaged in B2B relations only and do not sell their products to consumers.
Benefits for consumers	Consumers may indirectly benefit from increased business activity.
Costs and benefits for businesses	
Costs for businesses	Businesses that impose unfair terms might need to adjust the conditions they offer and may incur operational costs. Businesses would no longer be reliant that their standard terms and conditions (which include some unfair terms) could be enforced and might be faced with some legal uncertainty. However the risk and costs are considered minor as including terms which grossly deviate from good commercial practices, contrary to good faith and fair dealing, do not correspond to normal business practice.
Benefits for businesses	Businesses would be protected against the enforcement of unfair terms and therefore would be able to avoid the detriment stemming from such terms in particular in Member States where there are no such specific provisions in place (e.g. BE, IT, ES, PL, UK) or where the unfairness control covers certain restrictive circumstances (e.g. DE, EE, FR, HU, FI). SMEs are likely to benefit in particular, as they usually have less market power to oppose unfair terms or legal resources to identify them in a contract. SMEs would gain a stronger position in negotiating the terms of a contract as they would not have to invest resources in negotiating against unfair terms.

Terms which are unfair if not sufficiently drawn to the buyer's attention

Issue:

A Common European Sales Law t could protect against standard terms of which the party not supplying them could not be aware: contract terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded..

Legal comparison:

Country	Provision comparison	Impact on the level of protection
BE	***Under general contract law it is generally held that standard terms are not accepted (and not part of the contract) until the other party has, at the latest at the moment the contract was concluded, knowledge of those terms or could have obtained knowledge of those terms, and he has accepted those terms.*** A Common European Sales Law would provide a higher level of protection because there is also an obligation for the party supplying the terms, to take reasonable steps to draw the other party's attention to the standard terms.	+
DE	Standard terms become part of the contract in B2B by agreement which can be explicit, implied or tacit. The incorporation of standard terms may be made by reference or derived from commercial practice. The party does not have to 'draw the other party's attention' to the terms. The other party is however protected by the unfairness control which includes transparency and the rule on surprise clauses.	=
EE	Estonian law provides this principle as part of the procedural fairness: § 37. Standard terms as part of contract: Standard terms are part of a contract if the party supplying the standard terms clearly refers to them as part of the contract before entering into the contract or while entering into the contract and the other party has the opportunity to examine their contents. Standard terms are also part of a contract if their existence could be presumed from the manner in which the contract was entered into and the other party was given the opportunity to examine their contents.	=
ES	A provision in Section 5 of the Standard Form Terms Act (Ley 7/1998, de 13 de abril, LCG) determines that a standard term will not be incorporated into the contract if the supplier of the term did not effectively ensure that the other party knew of the existence and content of the term.	=
FI	No such provision in Finnish law.	+
HU	No such provision in Hungarian law. However, Art. 205/B (1) of the Civil Code provides that standard terms become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance. Mandatory for B2B contracts.	-
IT	Arts. 1341 and 1342 Italian Civil Code: (1) Standard terms or model contracts supplied by one party are effective as against the other party if the latter was aware of them at the time of conclusion of the contract, or should have been aware of them by using 'ordinaria diligenza'	+

	(appropriate care taking objective circumstances into account); (2) Terms regarding the limitation of liability or the right to terminate the contract or to withhold performance in favour of the supplier of the term, as well as terms imposing to the other party cut-off periods, limitations as to counter-claims, limitations of freedom of contract with third parties, tacit prorogation or renewal of the contract, arbitral clauses or derogation to jurisdiction have to be individually approved in writing by the other party. This provision introduces a formal requirement of signature of the contract (and any specifically indicated unfair clause) by the other party, but it does not amount to a substantive test.	
PL	There is no such provision.	+
PT	Terms are excluded from the contract if the party supplying the terms did not fulfil the duty of communication or the duties of information to the other party about the terms– Arts. 5, 6 and 8 of the Decree-Law 446/85, from the 25th October 1986. When the other party was not aware of the terms, they are also automatically excluded if there was a lack of communication or information or if, by their context, title or presentation, said terms would not be noticed by a normal contracting party in the position of the real one (Art. 8 of the Decree-Law 446/85).	+
UK	England and Wales: Where the relevant term is not in a signed document but, e.g., on a ticket, then it will be incorporated into the contract only if the party supplying it gives reasonable notice of the term to the other party. Where a term is unusual or onerous, the degree of notice required is greater and it may be necessary to draw attention to the term specifically. Where the term is in a document that has been signed by the other party, it will form part of the contract; but the legislation controlling unfair terms (Unfair Contract Terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1999) are frequently used (when applicable) to deal with clauses that are unfairly surprising. In Scotland: No such rule.	= +

Assessment of impacts

Costs for consumers	Consumers are unlikely to be concerned.
Benefits for consumers	Consumers are unlikely to be concerned.
Costs and benefits for businesses	
Costs for businesses	Businesses supplying the terms to a contract would be obliged to take reasonable steps to draw the other party's attention to them, before or when the contract was concluded. Any additional costs are considered as minor as informing the other party about inserted terms would correspond to normal business practice. Business from countries where the similar rules are in place at present (e.g. EE, DE, ES) would not bear any additional costs. In HU where the present rules are more strict i.e. provide that standard terms become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance, the protection for businesses would decrease slightly (they would need to be informed about such terms, but the explicit acceptance would not be required).

Benefits for businesses	Businesses would be protected against terms supplied by the other party of which they were not aware. In a number Member States, at present there are no such rules or rules are less strict i.e. (e.g. BE, UK, PT, PL, IT, FI). Businesses in these countries would gain more confidence as they would need to be made aware of all the terms supplied by the other party or otherwise they could not be invoked against them.

Seller's right to cure for fundamental non-performance

Issue:

A Common European Sales Law could foresee a seller's right to cure his non-performance in the following cases:
- A seller who has delivered goods early and who is notified that they are not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.
- In other cases a seller who has tendered a performance which is not in conformity with the contract may, on being notified of the non-conformity, offer to cure it at the seller’s own expense.

Legal comparison:

Country	Provision comparison	Impact on the level of protection
BE	Such a provision does not exist under Belgian law. Although some roughly similar results may be reached under several legal basis (e.g. Arts. 1610, 1630-1637, 1641-1646 and 1184 of the Civil Code), a Common European Sales Law would set out a clear provision on the seller's right to cure his non-performance, which would be more protective towards the seller.	+
EE	-No such rule in Estonian law. - LOA § 107. Cure: (1) A party who fails to perform a contractual obligation may, at the party’s own expense, cure the non-performance, including improving or replacing defective a performance, as long as the other party has not withdrawn from or cancelled the contract or demanded compensation for damage in lieu of the performance, provided that: cure is reasonable in the circumstances, and cure does not cause unreasonable inconvenience or expenses to the injured party, and the injured party has no legitimate interest in refusing a cure. (2) A non-performing party may cure non-performance within a reasonable period of time after the party has given notice to the injured party of the intention to cure and of the proposed manner and timing of the cure and if the injured party with a legitimate interest in refusing cure has not given notice of such refusal within a reasonable period of time.	+ =
ES	No specific provision for B2B transactions, however case law may lead to roughly similar results but with less precision and certainty.	+
FI	Sale of Goods Act, Section 36: the seller may, at his own expense, remedy the defect or deliver substitute goods if this can be done without substantial inconvenience to the buyer or uncertainty of reimbursement by the seller of any expenses advanced by the buyer.	=
HU	There is no such specific provision in Hungarian law.	+

IT	While there is no specific provision in the Italian Civil Code on the debtor's (or seller's) right to cure non-performance, either in case of early performance or in other cases of non-conformity, scholars and case-law have suggested that the debtor's (or seller's) offer for a conforming tender should be taken into account in assessing whether parties behaved according to fair dealing (Art. 1175 of the Civil Code). Moreover, the debtor (or seller) can make a new conforming tender as long as the other party has not requested a termination.	Slightly +
PL	- There is no such provision. - There is a similar provision. Under Art. 560 §1 of the Civil Code the buyer's termination of the contract is ineffective if the seller cures the non-conformity of goods with the contract (replace or repair the good) without unreasonable delay.	+ =
PT	- The seller has a right to cure. - The buyer may refuse the cure if he opts for the rescission of the contract because of the defects – Art. 913 para 1 of the Civil Code.	= +
UK	England and Wales: English law contains the same rule. Scotland: The rules on the right to cure a defective performance are not as clear or developed.	= +

Assessment of impacts:

Costs for consumers	Consumers are unlikely to be concerned.
Benefits for consumers	Consumers are unlikely to be concerned.
Costs and benefits for businesses	
Costs for businesses	There could be some additional costs for buyers as the sellers would have the right to cure for non-performance whereas at present in some Member States a buyer can refuse the cure and opt for the recession of contract. However, normally a buyer should be interested in bringing the delivered goods in conformity as soon as possible and not having to search for a new supplier or becoming involved in disputes with the first supplier.
Benefits for businesses	In a number of Member States the rules on the right to cure a defective performance are not as clear or developed (e.g. HU, ES, EE, IT). These rules would give the opportunity to the seller to cure for non-performance and thus avoid additional costs if a buyer opts for the recession of contract and compensation for damages.

ANNEX IX: RANKING OF BARRIERS TO TRADE

Surveys among businesses who are involved or interested in starting cross-border trade provided data on obstacles to cross-border transactions in the internal market. Eurobarometer 320 *European contract law in business-to-business transactions* (B2B) and Eurobarometer 321 *European contract law in business-to-consumer transactions* (B2C) list and rank the obstacles that have an impact on the cross-border trade of businesses in the internal market.

The barriers identified are of a regulatory nature (tax regulations, contract law related difficulties, licensing and registration requirements) and of a practical nature (e.g. after-sales maintenance). Cultural differences are also accounted for. The obstacles identified below to a large extent comprehensively cover the various barriers that businesses may still encounter in the internal market. This is proven by the fact that in both surveys the share of respondents who indicated that they were affected by 'other obstacles' than those identified in the questionnaire was very small.

For the purpose of identifying how the barriers to trade affect businesses, it is essential to find out how businesses perceive these barriers. While perceptions are by nature subjective, they are an important driver determining the business decision to enter into cross-border trade. The survey method is particularly appropriate for collecting data on perceptions, as it is based on the opinions of the respondents.

1. **Barriers to cross-border B2C transactions (based on EB 321)**

A contract law-related problem (difficulty in finding out about the provisions of a foreign contract law) was ranked as the top barrier for B2C transactions, with 40% of the surveyed companies indicating that it had an impact on their decision to trade cross-border. Other contract law related problems are ranking third, sixth and seventh.

The overall picture of barriers to B2C cross-border trade is illustrated by the figures below, with contract law related obstacles indicated in bold:

I - **Difficulty in finding out about the provisions of a foreign contract law, 40%**
II - Tax regulations, 39%
III - **The need to adapt and comply with different consumer protection rules in the foreign contract laws, 38%**
IV - Language (communication problems, translating documents, etc.), 36%
V - Formal requirements e.g. licensing, registration procedure, 35%
VI - **Obtaining legal advice on foreign contract law, 35%**
VII - **Problems in resolving cross-border conflicts, including costs of litigation abroad, 34%**
VIII - Problems with cross-border delivery, 32%
IX - After-sales maintenance abroad, 31%
X - Cultural differences, 27%
XI – Other, 11%

The above data shows that a significant percentage of companies who are interested in cross-border trade are hindered by remaining barriers in the internal market. Contract law related obstacles rank high among the barriers that hinder businesses.

2. Barriers to cross-border B2B transactions (based on EB 320)

Tax regulations were ranked as the main obstacle in B2B transactions, closely followed by formal requirements and a contract law-related barrier, i.e. the **difficulty in finding out about the provisions of a foreign contract law.** Thus a contract law related obstacle ranked among the top three barriers to trade with 35% of respondents saying that it had an impact on their decision to trade cross-border. Other contract law related problems ranked sixth, seventh and ninth.

The overall picture of barriers to B2B cross-border trade is illustrated by the figures below, with contract law related obstacles indicated in bold:

I – Tax regulations, 38%
II - Formal requirements e.g. licensing, registration procedures, 36%
III - **Difficulty in finding out about the provisions of a foreign contract law, 35%**
IV - Language (communication problems, translating documents, etc.), 34%
V - Problems with cross-border delivery, 34%
VI - **Problems in resolving cross-border conflicts, including costs of litigation abroad, 32%**
VII - **Obtaining legal advice on foreign contract law, 31%**
VIII - After-sales maintenance abroad, 30%
IX - **Difficulty in agreeing on the foreign applicable contract law, 30%**
X - Cultural differences, 25%
XI – Other, 12%



RAT DER EUROPÄISCHEN UNION

Brüssel, den 13. Oktober 2011 (OR. en)

15429/11

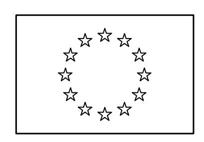
Interinstitutionelles Dossier: 2011/0284 (COD)

JUSTCIV 265
CONSOM 158
CODEC 1667

VORSCHLAG	
der:	Europäischen Kommission
vom:	12. Oktober 2011
Nr. Komm.dok.:	KOM(2011) 635 endgültig
Betr.:	Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht

Die Delegationen erhalten in der Anlage den mit Schreiben von Herrn Jordi AYET PUIGARNAU, Direktor, an den Generalsekretär des Rates der Europäischen Union, Herrn Uwe CORSEPIUS, übermittelten Vorschlag der Europäischen Kommission.

Anl.: KOM(2011) 635 endgültig



EUROPÄISCHE KOMMISSION

Brüssel, den 11.10.2011
KOM(2011) 635 endgültig

2011/0284 (COD)

Vorschlag für eine

VERORDNUNG DES EUROPÄISCHEN PARLAMENTS UND DES RATES

über ein Gemeinsames Europäisches Kaufrecht

{SEK(2011) 1165 endgültig}
{SEK(2011) 1166 endgültig}

BEGRÜNDUNG

1. HINTERGRUND DES VORSCHLAGS

- Gründe und Ziele

Das von Mitgliedstaat zu Mitgliedstaat unterschiedliche Vertragsrecht hindert Unternehmer und Verbraucher an grenzübergreifenden Geschäften im Binnenmarkt. Es hält Unternehmer und insbesondere kleine und mittlere Unternehmen (KMU) davon ab, Geschäfte über Staatsgrenzen hinweg zu tätigen oder auf Märkte neuer Mitgliedstaaten zu expandieren, und hindert Verbraucher daran, auf in anderen Mitgliedstaaten angebotene Waren oder Dienstleistungen zuzugreifen.

Gegenwärtig exportiert nur einer von zehn Unternehmern, die im Warenhandel tätig sind, aus der Europäischen Union in andere EU-Länder, und in den meisten Fällen beschränken sich diese Ausfuhren auf wenige Mitgliedstaaten. Mit dem Vertragsrecht zusammenhängende Hindernisse tragen wesentlich zu dieser Situation bei. Umfragen[1] zeigen, dass unter den Erschwernissen für den grenzübergreifenden Handel, zu denen auch steuerliche Regelungen, Verwaltungsanforderungen, Lieferschwierigkeiten, Sprache oder Kultur gehören, vertragsrechtsbezogene Hindernisse nach Auskunft der Unternehmer an vorderer Stelle rangieren.

Dass sich Unternehmer an das in den grenzübergreifenden Geschäftsbeziehungen jeweils anwendbare einzelstaatliche Vertragsrecht anpassen müssen, macht den Handel mit Unternehmen und Verbrauchern im Ausland komplizierter und kostenträchtiger als den Handel im Inland.

Üblicherweise fallen im Außenhandel gegenüber dem Binnenhandel zusätzliche Transaktionskosten an. Dazu zählen die Schwierigkeit, sich mit einschlägigem ausländischem Vertragsrecht vertraut zu machen, Rechtsberatung, Verhandlungen über das anwendbare Recht bei Geschäften zwischen Unternehmen und die Anpassung von Verträgen an die verbraucherrechtlichen Anforderungen bei Geschäften zwischen Unternehmen und Verbrauchern.

In grenzübergreifenden Geschäften zwischen Unternehmen und Verbrauchern spielen vertragsbedingte Transaktionskosten und rechtliche Hindernisse, die durch die Unterschiede zwischen den zwingenden Verbraucherschutzvorschriften der Mitgliedstaaten bedingt sind, eine wichtige Rolle. Gemäß Artikel 6 der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I)[2] muss ein Unternehmen im Geschäftsverkehr mit Verbrauchern in einem anderen Mitgliedstaat das Vertragsrecht dieses Mitgliedstaats einhalten. Wenn die Vertragspartner sich auf die Anwendung eines anderen Rechts geeinigt haben und verbindliche Verbraucherschutzvorschriften des Mitgliedstaats des Verbrauchers ein höheres Schutzniveau bieten, sind diese verbindlichen Vorschriften einzuhalten. Unternehmer müssen sich daher im Voraus informieren, ob das Recht in dem Mitgliedstaat, in dem der Verbraucher

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1 Eurobarometer 320 (Europäisches Vertragsrecht in Geschäften zwischen Unternehmen), 2011, S. 15, und Eurobarometer 321 (Europäisches Vertragsrecht in Geschäften zwischen Unternehmen und Verbrauchern), 2011, S. 19.

2 ABl. L 177 vom 4.7.2008, S. 6.

seinen gewöhnlichen Aufenthalt hat, ein höheres Schutzniveau bietet, und sicherstellen, dass ihr Vertrag dessen Anforderungen genügt. Die bisherige Harmonisierung des Verbraucherschutzrechts auf EU-Ebene hat zwar in einigen Bereichen zu einer gewissen Annäherung geführt, doch bestehen zwischen den Rechtsvorschriften der Mitgliedstaaten nach wie vor erhebliche Unterschiede. Bei Online-Geschäften entstehen Unternehmern weitere vertragsrechtsbedingte Kosten, weil sie den Internet-Auftritt ihres Unternehmens den rechtlichen Anforderungen aller Mitgliedstaaten anpassen müssen, auf die sie ihre Geschäftstätigkeit ausrichten.

Grenzübergreifende Geschäfte, die Unternehmer untereinander tätigen, unterliegen zwar nicht den gleichen Beschränkungen hinsichtlich des anwendbaren Rechts, doch sind die wirtschaftlichen Auswirkungen der Vertragsverhandlungen und der Anwendung von ausländischem Recht nicht unerheblich. Insbesondere für KMU ist der Umgang mit unterschiedlichen Rechtsordnungen eine Belastung. KMU müssen in ihren Beziehungen zu größeren Unternehmen häufig der Anwendung des Rechts ihres Geschäftspartners zustimmen und die Kosten tragen, die für das Einholen von Informationen über den Inhalt und für die Einhaltung des auf den Vertrag anwendbaren ausländischen Rechts anfallen. Bei Verträgen zwischen KMU ist die Notwendigkeit, das anwendbare Recht auszuhandeln, ein erhebliches Hindernis für den grenzübergreifenden Handel. Diese zusätzlichen Transaktionskosten können für KMU bei beiden Vertragstypen (Verträge zwischen Unternehmen und Verträge zwischen Unternehmen und Verbrauchern) so hoch sein, dass sie im Verhältnis zum Vertragswert unangemessen sind.

Diese Transaktionskosten steigen proportional zur Zahl der Mitgliedstaaten, mit denen ein Unternehmen Handel treibt. Je größer die Zahl der Länder, in die sie exportieren, desto mehr Bedeutung messen Unternehmer den Unterschieden im Vertragsrecht als Handelshemmnis bei. KMU sind dabei besonders benachteiligt: je geringer der Umsatz, umso höher der Anteil der Transaktionskosten.

Unternehmer sind im Auslandshandel zudem mit größerer rechtlicher Komplexität konfrontiert als im Inlandshandel, da sie häufig mit dem Vertragsrecht mehrerer Mitgliedstaaten, d. h. mit divergierenden Bestimmungen, umgehen müssen.

Der Umgang mit ausländischem Recht macht grenzübergreifende Geschäfte noch komplizierter. Bei Geschäften zwischen Unternehmen und Verbrauchern setzten Unternehmer die Schwierigkeiten beim Umgang mit ausländischem Vertragsrecht an die erste, bei Geschäften zwischen Unternehmen an die dritte Stelle der Handelshemmnisse.[3] Die rechtlichen Rahmenbedingungen sind sehr viel komplexer bei Geschäften mit Ländern, deren Rechtssystem grundlegend anders ist. Untersuchungen haben ergeben, dass das Handelsvolumen zwischen Ländern, deren Rechtssysteme gemeinsame Wurzeln haben, sehr viel höher ist als zwischen Ländern, denen diese gemeinsame Grundlage fehlt.[4]

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[3] Eurobarometer 320 (Europäisches Vertragsrecht in Geschäften zwischen Unternehmen), 2011, S. 15, und Eurobarometer 321 (Europäisches Vertragsrecht in Geschäften zwischen Unternehmen und Verbrauchern), 2011, S. 19.

[4] A. Turrini und T. Van Ypersele, *Traders, courts and the border effect puzzle*, Regional Science and Urban Economics, 40, 2010, S. 82: Eine Analyse des internationalen Handels unter OECD-Ländern zeigt, dass unter Berücksichtigung länderspezifischer Faktoren, der Entfernung, gemeinsamer Landesgrenzen und einer gemeinsamen Sprache ähnliche Rechtssysteme einen erheblichen Einfluss auf den Handel haben. Das Handelsvolumen zwischen zwei Ländern, deren Rechtssysteme gemeinsame Wurzeln haben, ist durchschnittlich um 40 % höher.

Die Unterschiede im Vertragsrecht und die damit verbundenen zusätzlichen Transaktionskosten und Komplikationen halten somit eine beträchtliche Anzahl insbesondere kleiner und mittlerer Unternehmen von einer Expansion in andere EU-Länder ab. Dies hat auch eine Einschränkung des Wettbewerbs im Binnenmarkt zur Folge. Allein wegen der Unterschiede im Vertragsrecht entgehen dem zwischenstaatlichen Handel jedes Jahr Umsätze in zweistelliger Milliardenhöhe (in Euro).

Die verpassten Gelegenheiten im grenzübergreifenden Handel gereichen auch den europäischen Verbrauchern zum Nachteil. Weniger grenzübergreifender Handel führt zu weniger Importen und weniger Anbieterwettbewerb und damit möglicherweise zu geringerer Auswahl und höheren Preisen auf den Verbrauchermärkten.

Obwohl der Einkauf im Ausland dank eines breiteren und besseren Angebots wirtschaftlich deutlich vorteilhafter sein kann, kauft die Mehrheit der europäischen Verbraucher nur im Inland ein. Einer der Hauptgründe dafür ist, dass die Verbraucher wegen der Unterschiede im einzelstaatlichen Recht unsicher sind, welche Rechte ihnen im grenzübergreifenden Geschäftsverkehr zustehen. Eine ihrer wichtigsten Fragen ist beispielsweise, was sie tun können, wenn ein in einem anderen EU-Land erworbenes Produkt nicht dem entspricht, was im Kaufvertrag vereinbart war. Diese Unsicherheit hält viele Verbraucher davon ab, Einkäufe im Ausland zu tätigen. Ihnen entgehen dabei die Chancen, die der Binnenmarkt eigentlich bietet, da ein Produkt in einem anderen EU-Land oft in besserer Qualität und/oder billiger angeboten wird.

Das Internet erleichtert die Suche nach solchen Angeboten sowie den Vergleich von Preisen und anderen Konditionen unabhängig vom Niederlassungsort des Unternehmens. Wenn Verbraucher jedoch bei einem Unternehmen in einem anderen Mitgliedstaat bestellen wollen, passiert es ihnen oft, dass die Bestellung wegen der Unterschiede im Vertragsrecht der Mitgliedstaaten abgelehnt wird.

Das übergeordnete **Ziel** dieses Vorschlags ist es, den Binnenmarkt durch die Förderung des grenzübergreifenden Handels zwischen Unternehmen und des Auslandseinkaufs durch Verbraucher zu konsolidieren und funktionsfähiger zu machen. Dieses Ziel lässt sich mit einem Gemeinsamen Europäischen Kaufrecht, d. h. einem eigenständigen, einheitlichen Regelwerk erreichen, das sowohl vertragsrechtliche als auch Verbraucherschutzvorschriften enthält und als zweite Vertragsrechtsregelung neben dem innerstaatlichen Vertragsrecht der Mitgliedstaaten anzusehen ist.

Unternehmer sollten das Gemeinsame Europäische Kaufrecht bei allen grenzübergreifenden Geschäften innerhalb der Europäischen Union anwenden können, ohne sich den verschiedenen einzelstaatlichen Vertragsrechtsregelungen anpassen zu müssen, wenn die andere Vertragspartei dem zustimmt. Das Gemeinsame Europäische Kaufrecht sollte den ganzen Lebenszyklus eines Vertrags umfassen und somit die für den Abschluss grenzübergreifender Verträge wichtigsten Fragestellungen regeln. Unternehmer müssten sich infolgedessen im innerstaatlichen Recht anderer Mitgliedstaaten nur noch mit einigen wenigen, weniger wichtigen Fragen auseinandersetzen, die vom Gemeinsamen Kaufrecht nicht erfasst sind. Im Geschäftsverkehr zwischen Unternehmen und Verbrauchern müssten nicht erst die im nationalen Recht zwingenden Verbraucherschutzvorschriften ermittelt werden, da das Gemeinsame Europäische Kaufrecht bereits voll harmonisierte Verbraucherschutzvorschriften enthält, die überall in der Europäischen Union ein hohes Schutzniveau garantieren. In grenzübergreifenden Geschäften zwischen Unternehmen könnten die Verhandlungen über das anwendbare Recht reibungsloser verlaufen, da sich die

Vertragsparteien auf die Verwendung des Gemeinsamen Europäischen Kaufrechts verständigen könnten, das beiden Seiten gleichermaßen zur Verfügung steht.

Eine unmittelbare Folge wäre, dass Unternehmer bei den zusätzlichen, vertragsrechtsbezogenen Transaktionskosten Einsparungen erzielen könnten und die rechtlichen Rahmenbedingungen dank EU-weiter einheitlicher Regeln weniger komplex wären. Unternehmer könnten somit den Binnenmarkt besser zu ihrem Vorteil nutzen und über Staatsgrenzen hinweg expandieren, was zu mehr Wettbewerb im Binnenmarkt führen würde. Die Verbraucher hätten einen besseren Zugang zu Angeboten aus der gesamten Europäischen Union und niedrigeren Preisen und liefen seltener Gefahr, dass die Lieferung in einen anderen EU-Mitgliedstaat verweigert wird. Darüber hinaus hätten sie angesichts eines einheitlichen verbindlichen Regelwerks mit hohem Verbraucherschutzniveau größere Gewissheit über ihre Rechte beim Auslandseinkauf.

Allgemeiner Kontext

Mit ihrer Mitteilung aus dem Jahr 2001[5] hatte die Kommission eine umfassende Konsultation der Öffentlichkeit zu den uneinheitlichen vertragsrechtlichen Rahmenbedingungen in der EU und ihren nachteiligen Folgen für den grenzübergreifenden Handel eingeleitet. Im Juli 2010 hat sie mit der Veröffentlichung des „Grünbuchs zu Optionen für die Einführung eines Europäischen Vertragsrechts für Verbraucher und Unternehmen“[6] die Öffentlichkeit zu den verschiedenen politischen Optionen für eine Konsolidierung des Binnenmarkts durch Fortschritte im Bereich des europäischen Vertragsrechts konsultiert.

Das Europäische Parlament hat am 8. Juni 2011 mit einer Entschließung auf das Grünbuch reagiert und sich nachdrücklich für ein Instrument ausgesprochen, das zur Konsolidierung und Funktionsfähigkeit des Binnenmarkts beiträgt und für Unternehmer, Verbraucher und die Justizsysteme der Mitgliedstaaten von Vorteil ist.

In der Mitteilung „Europa 2020“[7] der Kommission wird die Notwendigkeit anerkannt, den Vertragsschluss mit Partnern in anderen EU-Ländern für Unternehmer und Verbraucher durch Fortschritte in Richtung auf ein fakultatives europäisches Vertragsrecht einfacher und billiger zu machen. In der Digitalen Agenda für Europa[8] wird ein fakultatives Instrument zum europäischen Vertragsrecht in Betracht gezogen, um die Uneinheitlichkeit des Vertragsrechts in der EU zu überwinden und das Vertrauen der Verbraucher in den elektronischen Handel zu stärken.

- Bestehende Rechtsvorschriften auf diesem Gebiet

Das Vertragsrecht der einzelnen Mitgliedstaaten unterscheidet sich erheblich voneinander. Die Regulierung des Vertragsrechts begann auf EU-Ebene mit den Harmonisierungsrichtlinien im Bereich des Verbraucherschutzes. Das Konzept der Mindestharmonisierung bot den Mitgliedstaaten die Möglichkeit, strengere verbindliche Regelungen als die des Acquis beizubehalten oder einzuführen. In der Praxis hat das in den

[5] KOM(2001) 398 vom 11.7.2001.
[6] KOM(2010) 348 endg. vom 1.7.2010.
[7] Auch in der Binnenmarktakte (KOM(2011) 206 endg. vom 13.4.2011, S. 19) und im Jahreswachstumsbericht (Anhang I), Fortschrittsbericht zu Europa 2020 (KOM(2011) 11, A1/2, vom 12.1.2010, S. 5) findet die Initiative zum Vertragsrecht Erwähnung.
[8] KOM(2010) 245 endg. vom 26.8.2010, S. 13.

Mitgliedstaaten zu divergierenden Lösungen selbst in den auf Unionsebene harmonisierten Bereichen geführt. Im Gegensatz dazu wird mit der vor kurzem angenommenen Richtlinie über Verbraucherrechte eine Vollharmonisierung bestimmter Bereiche – vorvertragliche Informationspflichten, Widerrufsrecht bei Fernabsatz- und außerhalb von Geschäftsräumen geschlossenen Verträgen sowie bestimmte Aspekte der Lieferung von Waren und des Gefahrübergangs – angestrebt.

Was die Geschäftsbeziehungen zwischen Unternehmern anbelangt, so hat die EU zur Eindämmung des Zahlungsverzugs Vorschriften über Mindestzinssätze erlassen. Auf internationaler Ebene gilt das Wiener Übereinkommen über Verträge über den internationalen Warenkauf, wenn die Parteien kein anderes Recht gewählt haben. Dort werden bestimmte Aspekte des Warenkaufs geregelt, jedoch wichtige Sachverhalte nicht behandelt, wie Einigungsmängel, unlautere Vertragsklauseln und Verjährung. Weiter eingeschränkt wird seine Anwendbarkeit dadurch, dass nicht alle Mitgliedstaaten[9] dem Wiener Übereinkommen beigetreten sind und keine Vorkehrungen zu seiner einheitlichen Auslegung getroffen wurden.

Bestimmte EU-Vorschriften sind für die Geschäftsbeziehungen sowohl zwischen Unternehmen als auch zwischen Unternehmen und Verbrauchern relevant. Die Richtlinie über den elektronischen Geschäftsverkehr[10] enthält Regeln über die Gültigkeit von auf elektronischem Wege geschlossenen Verträgen und über bestimmte vorvertragliche Anforderungen.

Im Bereich des Internationalen Privatrechts hat die Union Regelungen zur Rechtswahl eingeführt wie insbesondere die Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I)[11] und in Bezug auf vorvertragliche Informationspflichten die Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)[12]. Die erstere Verordnung regelt die Bestimmung des anwendbaren Rechts bei vertraglichen Schuldverhältnissen, die zweite Verordnung bei außervertraglichen Schuldverhältnissen einschließlich solchen, deren Entstehen wahrscheinlich ist.

Die Verordnungen Rom I und Rom II gelten weiter. Sie bleiben von diesem Vorschlag unberührt. Es wird nach wie vor nötig sein, das anwendbare Recht bei grenzübergreifenden Verträgen zu bestimmen. Hierzu dient die Verordnung Rom I. Die Parteien können selbst bestimmen, welches Recht Anwendung finden soll (Artikel 3 der Verordnung Rom I). Treffen sie keine Rechtswahl, gilt die Auffangregelung in Artikel 4 der Verordnung Rom I. Für Verbraucherverträge gilt nach Artikel 6 Absatz 1 der Verordnung Rom I, dass mangels Rechtswahl das Recht des Staates Anwendung findet, in dem der Verbraucher seinen gewöhnlichen Aufenthalt hat.

Das Gemeinsame Europäische Kaufrecht wird in jedem Mitgliedstaat als fakultatives zweites Vertragsrecht zur Verfügung stehen. Haben die Parteien die Anwendung des Gemeinsamen Europäischen Kaufrechts vereinbart, gelten für Fragen, die in seinen Anwendungsbereich

[9] Das Vereinigte Königreich, Irland, Portugal und Malta haben das Übereinkommen nicht unterzeichnet.
[10] Richtlinie 2000/31/EG des Europäischen Parlaments und des Rates vom 8. Juni 2000 über bestimmte rechtliche Aspekte der Dienste der Informationsgesellschaft, insbesondere des elektronischen Geschäftsverkehrs, im Binnenmarkt, ABl. L 178 vom 17.7.2000, S. 1-16.
[11] ABl. L 177 vom 4.7.2008, S. 6.
[12] ABl. L 199 vom 31.7.2007, S. 40.

fallen, nur diese Bestimmungen. Die Anwendung anderer einzelstaatlicher Vorschriften ist in diesem Fall ausgeschlossen. Die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts basiert auf einer Wahl zwischen zwei verschiedenen Kaufrechtssystemen innerhalb derselben einzelstaatlichen Rechtsordnung und ist daher nicht mit einer Rechtswahl im Sinne des Internationalen Privatrechts gleichzusetzen oder zu verwechseln.

Da das Gemeinsame Europäische Kaufrecht nicht alle vertragsrechtlichen Aspekte regelt (z. B. Rechtswidrigkeit von Verträgen, Stellvertretung), ist für die nicht geregelten Bereiche weiterhin das geltende Vertragsrecht der Mitgliedstaaten maßgebend.

In den Geschäftsbeziehungen zwischen Unternehmen und Verbrauchern ist die Rechtswahl nach der Verordnung Rom I eingeschränkt. Wählen die Parteien eines Verbrauchervertrags unter Beachtung des Artikels 6 Absatz 1 der Verordnung Rom I das Recht eines anderen Mitgliedstaats als des Staates, in dem der Verbraucher seinen gewöhnlichen Aufenthalt hat, darf dies nach Artikel 6 Absatz 2 dieser Verordnung nicht dazu führen, dass dem Verbraucher der Schutz der zwingenden Rechtsvorschriften seines Staats entzogen wird. Diese letztere Bestimmung hat allerdings praktisch keine Auswirkungen, wenn die Parteien im Rahmen des anwendbaren Rechts das Gemeinsame Europäische Kaufrecht gewählt haben, weil die Bestimmungen dieses Gemeinsamen Kaufrechts in dem Land, dessen Recht gewählt wurde, identisch sind mit den Bestimmungen des Gemeinsamen Europäischen Kaufrechts im Land des Verbrauchers. Dem Verbraucher wird somit nicht der Schutz entzogen, den er in seinem Land genießt, da die zwingenden Verbraucherschutzvorschriften seines Landes kein höheres Schutzniveau bieten.

- Übereinstimmung mit der Politik und den Zielen der Union in anderen Bereichen

Dieser Vorschlag steht mit dem Ziel der Verwirklichung eines hohen Verbraucherschutzniveaus in Einklang, da er verbindliche Verbraucherschutzregeln enthält, von denen die Parteien nicht zum Nachteil des Verbrauchers abweichen dürfen. Das Schutzniveau dieser verbindlichen Bestimmungen liegt auf dem Niveau des gegenwärtigen Acquis oder sogar darüber.

Ferner entspricht der Vorschlag dem Bestreben der Union, die KMU bei der intensiveren Wahrnehmung der durch den Binnenmarkt gebotenen Möglichkeiten zu unterstützen. Das Gemeinsame Europäische Kaufrecht kann für Verträge zwischen Unternehmen gewählt werden, bei denen mindestens eine Partei ein KMU im Sinne der Empfehlung 2003/361/EG der Kommission[13] betreffend die Definition der Kleinstunternehmen sowie der kleinen und mittleren Unternehmen ist, wobei künftige Entwicklungen berücksichtigt werden.

Schließlich steht der Vorschlag mit der Handelspolitik der Union in Einklang, da Parteien aus Drittländern nicht diskriminiert werden und ebenfalls für das Gemeinsame Europäische Kaufrecht optieren können, solange eine der Vertragsparteien in einem EU-Mitgliedstaat niedergelassen ist.

Dieser Vorschlag greift künftigen Initiativen der Kommission in Bezug auf die Haftung für Verstöße gegen den Vertrag über die Arbeitsweise der Europäischen Union (z. B. Verstöße gegen das EU-Wettbewerbsrecht) nicht vor.

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[13] ABl. L 124 vom 20.5.2003, S. 36.

2. ERGEBNISSE DER KONSULTATIONEN UND FOLGENABSCHÄTZUNGEN

- Konsultation der Öffentlichkeit

Mit der Veröffentlichung des Grünbuchs hat die Kommission eine umfassende Konsultation der Öffentlichkeit in die Wege geleitet, die am 31. Januar 2011 abgeschlossen wurde. Auf das Grünbuch gingen bei der Kommission 320 Stellungnahmen von Interessenträgern sämtlicher Provenienz aus der gesamten EU ein. In vielen Stellungnahmen wurden die Option 1 (Veröffentlichung der Ergebnisse der Expertengruppe) und die Option 2 („Toolbox" für den Unionsgesetzgeber) positiv bewertet. Die Option 4 (fakultatives europäisches Vertragsrechtsinstrument) erhielt sowohl für sich genommen als auch in Verbindung mit einer „Toolbox" die Zustimmung mehrerer Mitgliedstaaten und anderer Interessenträger, sofern bestimmte Voraussetzungen erfüllt wären, wie ein hohes Verbraucherschutzniveau und klare, benutzerfreundliche Formulierungen. Etwaige Bedenken galten vor allem den eher vagen Ausführungen im Grünbuch zum möglichen Inhalt eines europäischen Vertragsrechts. Die Kommission trug diesen Bedenken Rechnung, indem sie den Interessenträgern die Gelegenheit einräumte, zur Durchführbarkeitsstudie der Expertengruppe zum europäischen Vertragsrecht Stellung zu nehmen.

Auch zum materiellen Anwendungsbereich des Instruments wurden aus den Antworten auf das Grünbuch Präferenzen deutlich. Der vorliegende Vorschlag betrifft infolgedessen in erster Linie Kaufverträge.

Mit Beschluss vom 26. April 2010[14] hatte die Kommission eine Expertengruppe zum europäischen Vertragsrecht eingesetzt. Diese Gruppe wurde mit der Ausarbeitung einer Durchführbarkeitsstudie für ein künftiges Instrument zum europäischen Vertragsrecht betraut, das die wichtigsten Fragen abdeckt, die sich bei grenzübergreifenden Geschäften in der Praxis stellen.

Im September 2010 wurde eine Gruppe mit den wichtigsten Interessenträgern (Wirtschafts- und Verbraucherverbände, Vertreter des Banken- und des Versicherungssektors sowie der Rechtsberufe (Rechtsanwälte und Notare)) eingesetzt, die der Sachverständigengruppe mit praktischen Hinweisen zur Benutzerfreundlichkeit der für die Durchführbarkeitsstudie entwickelten Regeln zuarbeiten sollte. Die Durchführbarkeitsstudie wurde am 3. Mai 2011 veröffentlicht; das informelle Konsultationsverfahren lief bis zum 1. Juli 2011.

- Folgenabschätzung

In der Folgenabschätzung wurden die sieben im Grünbuch aufgeführten Optionen vollständig beschrieben und analysiert.

Diese Optionen reichten von der Beibehaltung der bisherigen Politik (keine Maßnahme) über eine „Toolbox" für den Gesetzgeber, eine Empfehlung zu einem Gemeinsamen Europäischen Kaufrecht, eine Verordnung zur Einführung eines fakultativen Vertragsrechts, eine Richtlinie (Voll- oder Mindestharmonisierung) über ein verbindliches Gemeinsames Europäisches Kaufrecht und eine Verordnung zur Einführung eines europäischen Vertragsrechts bis hin zu einer Verordnung zur Einführung eines europäischen Zivilgesetzbuchs.

[14] ABl. L 105 vom 27.4.2010, S. 109.

In ihrer vergleichenden Analyse dieser Optionen gelangte die Kommission zu der Schlussfolgerung, dass die angestrebten politischen Ziele mit einer fakultativen einheitlichen Vertragsrechtsregelung, einer Vollharmonisierungsrichtlinie oder einer Verordnung zur Einführung eines verbindlichen einheitlichen Vertragsrechts erreicht würden. Die letzten beiden Optionen würden zwar eine beträchtliche Minderung der Transaktionskosten für Unternehmer bewirken und die rechtlichen Rahmenbedingungen für den grenzübergreifenden Handel vereinfachen, gleichzeitig aber eine erhebliche Belastung für alle Unternehmer nach sich ziehen, da sich selbst ausschließlich im Inland tätige Unternehmer dem neuen Rechtsrahmen anpassen müssten. Die Kosten für die Einstellung auf die neuen verbindlichen Bestimmungen wären insbesondere im Vergleich zu einem fakultativen einheitlichen Vertragsrechtssystem erheblich, da sie von allen Unternehmern zu tragen wären. Mit einem fakultativen einheitlichen Vertragsrechtssystem würden hingegen nur den Unternehmern einmalig Kosten entstehen, die dieses System für ihre Auslandsgeschäfte verwenden wollen. Die Einführung eines fakultativen einheitlichen Vertragsrechtssystems wurde daher als die verhältnismäßigste Maßnahme eingestuft, da sie die Transaktionskosten für Unternehmer, die in andere Mitgliedstaaten verkaufen, verringern und den Verbrauchern eine breitere Auswahl und günstigere Preise garantieren würde. Eine solche Regelung würde auch das Schutzniveau für Verbraucher beim Einkauf im Ausland erhöhen und Vertrauen schaffen, da sie EU-weit die gleichen Rechte in Anspruch nehmen könnten.

3. RECHTLICHE ASPEKTE DES VORSCHLAGS

- Zusammenfassung der geplanten Maßnahme

Mit dem Vorschlag soll ein Gemeinsames Europäisches Kaufrecht eingeführt werden. Die Harmonisierung des Vertragsrechts der Mitgliedstaaten soll nicht durch eine Änderung des bestehenden innerstaatlichen Vertragsrechts bewirkt werden, sondern durch Schaffung einer fakultativen zweiten Vertragsrechtsregelung in jedem Mitgliedstaat für in ihren Anwendungsbereich fallende Verträge. Diese zweite Vertragsrechtsregelung ist in der ganzen Europäischen Union gleich und findet parallel zum bestehenden innerstaatlichen Vertragsrecht Anwendung. Das Gemeinsame Europäische Kaufrecht kann auf grenzübergreifende Verträge angewendet werden, wenn die Vertragsparteien dies ausdrücklich beschließen.

- Rechtsgrundlage

Rechtsgrundlage dieses Vorschlags ist Artikel 114 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV).

Der Vorschlag sieht die Einführung eines Gemeinsamen Europäischen Kaufrechts, d. h. eines eigenständigen, einheitlichen Regelwerks mit voll harmonisierten Vertragsrechtsbestimmungen einschließlich Verbraucherschutzvorschriften vor, das im Recht der Mitgliedstaaten als zweites Vertragsrechtssystem gilt und bei gültiger Vereinbarung zwischen den Parteien auf grenzübergreifende Geschäfte angewendet werden kann. Diese Vereinbarung ist nicht mit der Wahl des anwendbaren Rechts im Sinne des Internationalen Privatrechts gleichzusetzen und darf auch nicht damit verwechselt werden. Die Wahl erfolgt vielmehr auf der Grundlage eines nationalen Rechts, das entsprechend dem Internationalen Privatrecht anwendbar ist.

Mit dieser Maßnahme soll der Binnenmarkt gefestigt und funktionsfähiger gemacht werden. Hindernisse für die Ausübung von Grundfreiheiten, die aus unterschiedlichen einzelstaatlichen Vorschriften herrühren, insbesondere die zusätzlichen Transaktionskosten und die komplizierte Rechtslage für Unternehmer bei grenzübergreifender Geschäftstätigkeit und das mangelnde Vertrauen der Verbraucher in ihre Rechte beim Einkauf im Ausland, und die alle unmittelbar die Errichtung und das Funktionieren des Binnenmarkts beeinträchtigen, würden beseitigt.

Im Einklang mit Artikel 114 Absatz 3 AEUV würde das Gemeinsame Europäische Kaufrecht ein hohes Verbraucherschutzniveau gewährleisten, da es verbindliche Regeln enthält, die das im bestehenden EU-Verbraucherrecht verankerte Schutzniveau beibehalten oder verbessern.

- Subsidiaritätsprinzip

Der Vorschlag steht im Einklang mit dem in Artikel 5 des Vertrags über die Europäische Union (EUV) niedergelegten Subsidiaritätsprinzip.

Das Ziel dieses Vorschlags, nämlich einen Beitrag zum reibungslosen Funktionieren des Binnenmarkts in der Form zu leisten, dass ein fakultatives einheitliches Vertragsrecht zur Verfügung gestellt wird, hat eine eindeutig grenzübergreifende Dimension und kann von den Mitgliedstaaten im Rahmen ihrer nationalen Rechtsordnungen nicht in ausreichendem Maße realisiert werden.

Solange Unterschiede im nationalen Vertragsrecht weiterhin erhebliche zusätzliche Transaktionskosten bei grenzübergreifenden Geschäften verursachen, kann das Ziel der Binnenmarktvollendung durch Erleichterung des grenzübergreifenden Geschäftsverkehrs für Unternehmen und Verbraucher nicht vollständig erreicht werden.

Mit dem Erlass nicht aufeinander abgestimmter Maßnahmen auf nationaler Ebene werden die Mitgliedstaaten die zusätzlichen Transaktionskosten und rechtlichen Komplikationen bei grenzübergreifenden Geschäften infolge der Unterschiede im nationalen Vertragsrecht nicht beseitigen können. Die Verbraucher werden sich weiter mit einer geringeren Auswahl und eingeschränktem Zugang zu Produkten aus anderen Mitgliedstaaten begnügen müssen und nicht das Vertrauen entwickeln, das auf einer genauen Kenntnis ihrer Rechte beruht.

Das Ziel dieses Vorschlags lässt sich daher im Einklang mit dem Subsidiaritätsprinzip besser auf Unionsebene verwirklichen. Die Union ist die am besten geeignete Ebene, um mit einer Maßnahme zum Vertragsrecht, die die Regeln für grenzübergreifende Geschäfte angleicht, die mit der Rechtsfragmentierung verbundenen Probleme zu lösen. Zudem würden rechtliche Unterschiede, die zu höheren Transaktionskosten und Lücken im Verbraucherschutz führen, andernfalls weiter zunehmen, weil sich die Märkte weiterentwickeln und die Mitgliedstaaten dazu veranlassen dürften, beispielsweise zur Regulierung der entstehenden Märkte für digitale Inhalte eigenständig Maßnahmen zu ergreifen.

- Verhältnismäßigkeitsprinzip

Der Vorschlag steht im Einklang mit dem Verhältnismäßigkeitsprinzip gemäß Artikel 5 EUV.

Der Anwendungsbereich des Vorschlags ist auf die Aspekte beschränkt, die grenzübergreifende Geschäfte erheblich behindern, und erstreckt sich nicht auf Aspekte, die durch einzelstaatliche Vorschriften besser geregelt werden könnten. In materiellrechtlicher

Hinsicht regelt der Vorschlag die Rechte und Pflichten der Parteien während des Lebenszyklus eines Vertrags, nicht aber beispielsweise Fragen der Stellvertretung, bei denen es weniger häufig zu Streitigkeiten kommen dürfte. In räumlicher Hinsicht erstreckt sich der Vorschlag auf grenzübergreifende Sachverhalte, weil es dort aufgrund der zusätzlichen Transaktionskosten und rechtlichen Komplexität zu Problemen kommt. Der persönliche Anwendungsbereich des Vorschlags beschränkt sich auf Geschäftsbeziehungen zwischen Unternehmen, von denen mindestens eines ein KMU ist, und zwischen Unternehmen und Verbrauchern, da dort die meisten Probleme im Binnenmarkt auftreten. Verträge zwischen Privatpersonen und Verträge zwischen Unternehmern, von denen keiner den Status eines KMU hat, sind nicht einbezogen, weil für eine Regelung dieser Vertragstypen kein nachweisbarer Bedarf besteht. Die Verordnung bietet den Mitgliedstaaten zwei Optionen: Sie können das Gemeinsame Europäische Kaufrecht auch für reine Inlandsgeschäfte anbieten sowie für Verträge zwischen Unternehmen, von denen keines den Status eines KMU hat.

Die Verhältnismäßigkeit der vorgeschlagenen Regelung gegenüber anderen möglichen Optionen ergibt sich aus dem fakultativen, freiwilligen Charakter des Gemeinsamen Europäischen Kaufrechts. Es gelangt nur dann zur Anwendung, wenn sich die Vertragsparteien auf seine Anwendung einigen, weil sie es für das betreffende grenzübergreifende Geschäft für vorteilhaft halten. Da das Gemeinsame Europäische Kaufrecht eine fakultative Regelung darstellt, die nur auf grenzübergreifende Sachverhalte Anwendung findet, ist es dazu geeignet, Hürden im grenzübergreifenden Handel zu überwinden, ohne mit fest verankerten nationalen Rechtssystemen und tief verwurzelten Traditionen zu kollidieren. Das Gemeinsame Europäische Kaufrecht ist als fakultative Regelung gedacht, die zusätzlich zu den Vertragsrechtssystemen der Mitgliedstaaten angeboten werden soll, ohne sie zu ersetzen. Diese legislative Maßnahme geht daher nicht über das hinaus, was nötig ist, um Unternehmern und Verbrauchern im Binnenmarkt weitere Möglichkeiten zu eröffnen.

- Wahl des Instruments

Vorgeschlagen wird der Erlass einer Verordnung zur Einführung eines fakultativen Gemeinsamen Europäischen Kaufrechts.

Ein nicht verbindliches Instrument wie eine „Toolbox“ für den EU-Gesetzgeber oder eine Empfehlung an die Mitgliedstaaten würde das Ziel, denn Binnenmarkt auszubauen und funktionsfähiger zu machen, nicht erreichen. Eine Richtlinie oder Verordnung, durch die nationales Recht durch ein obligatorisches europäisches Vertragsrecht ersetzt wird, würde zu weit gehen, da es auch Unternehmern, die nicht grenzübergreifend tätig werden wollen, Kosten auferlegen würde und diese Kosten nicht durch Einsparungen ausgeglichen würden, die lediglich dann auftreten, wenn Geschäfte grenzübergreifend getätigt werden. Auch eine Richtlinie mit Mindestnormen für ein obligatorisches europäisches Vertragsrecht wäre nicht sachgerecht, da sie nicht das zur Reduktion der Transaktionskosten erforderliche Maß an Rechtssicherheit und Einheitlichkeit schaffen würde.

4. AUSWIRKUNGEN AUF DEN HAUSHALT

Nach Annahme des Vorschlags wird die Kommission eine Datenbank für den Austausch von Informationen über rechtskräftige Gerichtsurteile zum Gemeinsamen Europäischen Kaufrecht oder zu anderen Bestimmungen der Verordnung sowie einschlägige Urteile des Gerichtshofs der Europäischen Union einrichten. Die Kosten für diese Datenbank dürften voraussichtlich

mit steigender Zahl der verfügbaren Urteile zunehmen. Gleichzeitig wird die Kommission Schulungen für Vertreter der Rechtsberufe ausrichten, die mit dem Gemeinsamen Europäischen Kaufrecht befasst sind.[15] Diese Kosten dürften voraussichtlich im Laufe der Zeit zurückgehen, je mehr sich das Wissen über das Gemeinsame Kaufrecht verbreitet.

5. WEITERE INFORMATIONEN

- Vereinfachung

Der Vorschlag zur Einführung einer fakultativen zweiten Vertragsrechtsregelung hat den Vorteil, dass es Vertragsparteien die Wahl eines EU-weit einheitlichen Vertragsrechts erlaubt, ohne das nationale Vertragsrecht abzuschaffen. Eine solche eigenständige, einheitliche Regelung ist geeignet, den Vertragsparteien für die bei grenzübergreifenden Geschäften am häufigsten auftretenden vertragsrechtlichen Probleme eine Lösung anzubieten. Unternehmer wären nicht länger gezwungen, sich mit unterschiedlichen einzelstaatlichen Vorschriften vertraut zu machen. Die Verbraucher würden mithilfe eines standardisierten Informationsblatts über die Rechte aufgeklärt, die ihnen das Gemeinsame Europäische Kaufrecht verleiht.

Schließlich könnte der Vorschlag die künftige Kohärenz des EU-Rechts in anderen Politikbereichen gewährleisten, in denen das Vertragsrecht Bedeutung erlangt.

- Überprüfung

Dem Vorschlag zufolge sollen das Gemeinsame Europäische Kaufrecht und die Verordnungsbestimmungen fünf Jahre nach Anwendungsbeginn u. a. unter Berücksichtigung der Notwendigkeit überprüft werden, ihren Anwendungsbereich in Bezug auf Verträge zwischen Unternehmen sowie hinsichtlich der Markt- und technologischen Entwicklungen bei digitalen Inhalten und der künftigen Entwicklung des Unionsrechts auszuweiten. Zu diesem Zweck wird die Kommission dem Europäischen Parlament, dem Rat und dem Europäischen Wirtschafts- und Sozialausschuss einen Bericht und erforderlichenfalls Vorschläge zur Änderung der Verordnung vorlegen.

- Europäischer Wirtschaftsraum

Die vorgeschlagene Verordnung ist von Bedeutung für den EWR und sollte deshalb auf den EWR ausgedehnt werden.

- Erläuterung des Vorschlags

Der Vorschlag besteht aus drei Hauptteilen: einer Verordnung, einem Anhang I mit den Vertragsrechtsbestimmungen (dem Gemeinsamen Europäischen Kaufrecht) und einem Anhang II mit dem Standard-Informationsblatt.

A. Die Verordnung

In *Artikel 1* werden Ziel und Gegenstand der Verordnung festgelegt.

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[15] Mitteilung der Kommission: Vertrauen schaffen in eine EU-weite Justiz: eine neue Dimension der europäischen Justizausbildung, KOM(2011) 551 endg. vom 13.9.2011.

Artikel 2 enthält eine Liste von Begriffsbestimmungen. Einige Definitionen existieren bereits im einschlägigen Acquis, andere Begriffe werden hier erstmalig definiert.

Artikel 3 bestimmt, dass es sich bei den Vertragsrechtsbestimmungen für grenzübergreifende Verträge über den Warenkauf, die Bereitstellung digitaler Inhalte und die Erbringung verbundener Dienstleistungen um eine fakultative Regelung handelt.

Artikel 4 präzisiert den Anwendungsbereich der Verordnung dahingehend, dass sie auf grenzübergreifende Verträge beschränkt ist.

Artikel 5 nennt als materiellen Anwendungsbereich Verträge über den Kauf von Waren, die Bereitstellung digitaler Inhalte und die Erbringung damit verbundener Dienstleistungen wie Montage, Installierung und Reparatur.

Artikel 6 schließt Mischverträge und mit einem Verbraucherkredit verbundene Verträge vom Anwendungsbereich der Verordnung aus.

Artikel 7 bestimmt, dass die Verordnung für Verträge zwischen Unternehmen und Verbrauchern sowie für Verträge zwischen Unternehmen gilt, von denen mindestens eines den Status eines KMU hat.

Artikel 8 schreibt vor, dass für die Anwendbarkeit des Gemeinsamen Europäischen Kaufrechts eine entsprechende Vereinbarung der Vertragsparteien erforderlich ist. Bei Verträgen zwischen einem Unternehmen und einem Verbraucher ist die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts nur gültig, wenn die Zustimmung des Verbrauchers durch eine ausdrückliche Erklärung gesondert von der Erklärung erteilt wird, durch die dem Abschluss des Vertrags zugestimmt wird.

Artikel 9 bestimmt, dass es dem Unternehmer bei Verbraucherverträgen obliegt, dem Verbraucher bestimmte Informationen über das Gemeinsame Europäische Kaufrecht zukommen zu lassen. Insbesondere muss dem Verbraucher das Informationsblatt in Anhang II übermittelt werden.

Artikel 10 verpflichtet die Mitgliedstaaten, dafür Sorge zu tragen, dass Sanktionen für den Fall vorgesehen sind, dass Unternehmer bestimmte in Artikel 8 und 9 niedergelegte Pflichten verletzen.

Artikel 11 bestimmt, dass bei gültiger Wahl des Gemeinsamen Europäischen Kaufrechts ausschließlich dieses für die in seinen Vorschriften geregelten Fragen maßgebend ist und andere einzelstaatliche Vorschriften keine Anwendung finden. Die Entscheidung für das Gemeinsame Kaufrecht gilt rückwirkend, um auch die Erfüllung der vorvertraglichen Informationspflichten und die Rechte bei deren Verletzung zu erfassen.

Artikel 12 stellt klar, dass die Verordnung die Informationspflichten, die nach der Richtlinie 2006/123/EG über Dienstleistungen im Binnenmarkt[16] bestehen, unberührt lässt.

Artikel 13 bietet den Mitgliedstaaten die Möglichkeit, das Gemeinsame Europäische Kaufrecht auch für reine Inlandsgeschäfte und für Verträge zwischen Unternehmern zur Verfügung zu stellen, von denen keiner den Status eines KMU hat.

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[16] ABl. L 376 vom 27.12.2006, S. 36.

Artikel 14 gibt den Mitgliedstaaten auf, innerstaatliche rechtskräftige Gerichtsurteile, in denen Bestimmungen des Gemeinsamen Europäischen Kaufrechts oder andere Vorschriften der Verordnung ausgelegt werden, der Kommission zur Kenntnis zu bringen. Die Kommission wird auf dieser Grundlage eine Datenbank mit den einschlägigen Urteilen einrichten.

Artikel 15 enthält eine Überprüfungsklausel.

In *Artikel 16* ist festgelegt, dass die Verordnung am zwanzigsten Tag nach dem Tag ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft treten soll.

B. Anhang I

Anhang I enthält den Text des Gemeinsamen Europäischen Kaufrechts.

Teil I („Einleitende Bestimmungen“) enthält die allgemeinen Grundsätze des Vertragsrechts, die alle Parteien im Umgang miteinander einhalten müssen, wie das Gebot, nach Treu und Glauben zu handeln und einen redlichen Geschäftsverkehr zu betreiben. Der Grundsatz der Vertragsfreiheit verschafft den Vertragsparteien die Gewissheit, dass sie von den Regeln des Gemeinsamen Europäischen Kaufrechts abweichen können, sofern letztere nicht – wie beispielsweise die Verbraucherschutzregeln – ausdrücklich für unabdingbar erklärt wurden.

Teil II („Zustandekommen eines bindenden Vertrags“) enthält Bestimmungen über das Recht der Parteien auf wesentliche vorvertragliche Informationen und Regeln für das Zustandekommen eines Vertrags. Dieser Teil enthält zudem spezifische Vorschriften, die dem Verbraucher ein Widerrufsrecht bei Fernabsatz- und außerhalb von Geschäftsräumen geschlossenen Verträgen einräumen. Des Weiteren sind hier die Gründe aufgeführt, aus denen Verträge angefochten werden können: Irrtum, arglistige Täuschung, Drohung oder unfaire Ausnutzung.

Teil III („Bestimmung des Vertragsinhalts“) enthält allgemeine Bestimmungen über die Auslegung von Vertragsbestimmungen in Zweifelsfällen. Er enthält darüber hinaus Bestimmungen zu Inhalt und Wirkungen von Verträgen und legt fest, welche Vertragsbestimmungen unfair und damit ungültig sein können.

Teil IV („Verpflichtungen und Abhilfen der Parteien eines Kaufvertrags oder eines Vertrags über die Bereitstellung digitaler Inhalte“) ist den Bestimmungen für Kaufverträge und Verträge über die Bereitstellung digitaler Inhalte und den Verpflichtungen des Verkäufers und des Käufers gewidmet. Dieser Teil enthält auch Bestimmungen zu den Abhilfen, die Käufer und Verkäufer bei Nichterfüllung geltend machen können.

Teil V („Verpflichtungen und Abhilfen der Parteien eines Vertrags über verbundene Dienstleistungen“) betrifft Fälle, in denen ein Verkäufer in enger Verbindung zu einem Kaufvertrag oder zu einem Vertrag über die Bereitstellung digitaler Inhalte bestimmte Dienstleistungen wie Montage, Installierung, Reparatur oder Wartung erbringt. Dort ist aufgeführt, welche spezifischen Regeln in diesen Fällen gelten und welche Rechte und Verpflichtungen die Parteien solcher Verträge haben.

Teil VI („Schadensersatz und Zinsen“) enthält zusätzliche gemeinsame Bestimmungen für Schadensersatz bei Verlust und Zinsen wegen verspäteter Zahlung.

In *Teil VII „Rückabwicklung“* ist geregelt, was im Falle der Anfechtung oder Beendigung eines Vertrags zurückzugeben ist.

Teil VIII „Verjährung“ regelt die Wirkungen des Zeitablaufs auf die Ausübung von Rechten aus einem Vertrag.

Anlage 1 enthält das Muster für die Widerrufsbelehrung, die der Unternehmer dem Verbraucher vor Abschluss eines im Fernabsatz oder außerhalb von Geschäftsräumen geschlossenen Vertrags zukommen lassen muss, während *Anlage 2* ein Standardformular für den Widerruf enthält.

C. Anhang II

Anhang II enthält das Standard-Informationsblatt zum Gemeinsamen Europäischen Kaufrecht, das der Unternehmer dem Verbraucher zukommen lassen muss, bevor eine Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts getroffen wird.

2011/0284 (COD)

Vorschlag für eine

VERORDNUNG DES EUROPÄISCHEN PARLAMENTS UND DES RATES

über ein Gemeinsames Europäisches Kaufrecht

DAS EUROPÄISCHE PARLAMENT UND DER RAT DER EUROPÄISCHEN UNION –

gestützt auf den Vertrag über die Arbeitsweise der Europäischen Union, insbesondere auf Artikel 114,

auf Vorschlag der Europäischen Kommission,

nach Zuleitung des Entwurfs des Gesetzgebungsakts an die nationalen Parlamente,

nach Stellungnahme des Europäischen Wirtschafts- und Sozialausschusses[17],

nach Stellungnahme des Ausschusses der Regionen[18],

gemäß dem ordentlichen Gesetzgebungsverfahren,

in Erwägung nachstehender Gründe:

(1) Für grenzübergreifende Wirtschaftstätigkeiten bestehen immer noch erhebliche Engpässe, die verhindern, dass der Binnenmarkt sein ganzes Potenzial für Wachstum und Schaffung von Arbeitsplätzen entfaltet. Gegenwärtig exportiert nur einer von zehn Unternehmern aus der Europäischen Union in andere EU-Länder, und in den meisten Fällen beschränken sich diese Ausfuhren auf wenige Mitgliedstaaten. Unter allen Hindernissen für den grenzübergreifenden Handel, zu denen unter anderem Steuerregelungen, Verwaltungsvorschriften, Lieferprobleme, Sprache und Kultur gehören, sehen Unternehmer die Schwierigkeit, sich über ausländisches Vertragsrecht zu informieren, als eines der größten Hindernisse sowohl für Geschäfte zwischen Unternehmen und Verbrauchern als auch für Geschäfte zwischen Unternehmen an. Dies wirkt sich wegen des geringeren Produktangebots auch zum Nachteil der Verbraucher aus. Das unterschiedliche Vertragsrecht der Mitgliedstaaten schreckt somit davon ab, Grundfreiheiten wie den freien Waren- und Dienstleistungsverkehr zu nutzen, und stellt ein Hindernis für das Funktionieren und die kontinuierliche Weiterentwicklung des Binnenmarkts dar. Zudem bewirkt es eine Beschränkung des Wettbewerbs, vor allem auf den Märkten kleinerer Mitgliedstaaten.

(2) Verträge sind das unentbehrliche rechtliche Instrument für jedes wirtschaftliche Geschäft. Die Notwendigkeit für Unternehmer, das anwendbare Recht zu ermitteln

[17] ABl. C […] vom […], S. […].
[18] ABl. C […] vom […], S. […].

oder auszuhandeln, sich über anwendbares ausländisches Recht zu informieren, das häufig auch übersetzt werden muss, rechtliche Beratung in Anspruch zu nehmen, um sich mit den einschlägigen Anforderungen vertraut zu machen, und ihre Verträge unter Umständen an das bei grenzübergreifenden Geschäften jeweils anwendbare einzelstaatliche Recht anpassen zu müssen, macht den Handel mit dem Ausland komplizierter und kostenträchtiger als den Handel im Inland. Die vertragsrechtsbedingten Hindernisse tragen somit maßgeblich dazu bei, eine erhebliche Zahl exportorientierter Unternehmer davon abzuhalten, in den grenzübergreifenden Handel einzusteigen oder ihre Geschäftstätigkeit auf weitere Mitgliedstaaten auszudehnen. Besonders stark ist ihre abschreckende Wirkung auf kleine und mittlere Unternehmen (KMU), für die die Kosten des Eintritts in mehrere ausländische Märkte im Verhältnis zum Umsatz oft besonders hoch sind. Infolgedessen entgehen den Unternehmen Kosteneinsparungen, die sie erzielen könnten, wenn es ihnen möglich wäre, Waren und Dienstleistungen auf der Grundlage eines für alle ihre grenzübergreifenden Geschäfte geltenden einheitlichen Vertragsrechts und im Internet auf der Grundlage einer einzigen Website zu vermarkten.

(3) Die vertragsrechtsbedingten Transaktionskosten, die, wie sich gezeigt hat, erheblich sind, und die rechtlichen Hindernisse, die durch die Unterschiede zwischen den zwingenden einzelstaatlichen Verbraucherschutzvorschriften bedingt sind, wirken sich bei Geschäften zwischen Unternehmen und Verbrauchern unmittelbar auf das Funktionieren des Binnenmarkts aus. Wenn ein Unternehmer seine Tätigkeiten auf Verbraucher in einem anderen Mitgliedstaat ausrichtet, gelten nach Artikel 6 der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Verordnung (EG) Nr. 593/2008)[19] die Verbraucherschutzvorschriften des Mitgliedstaats des gewöhnlichen Aufenthalts des Verbrauchers, die ein höheres Schutzniveau bieten und von denen nach diesem Recht nicht durch Vereinbarung abgewichen werden kann, selbst wenn die Parteien ein anderes anwendbares Recht gewählt haben. Unternehmer müssen sich daher im Voraus informieren, ob das Recht des Verbrauchers ein höheres Schutzniveau bietet, und sicherstellen, dass ihr Vertrag dessen Anforderungen genügt. Im elektronischen Geschäftsverkehr bringt darüber hinaus die Anpassung von Websites, die den zwingenden Anforderungen des anwendbaren ausländischen Verbrauchervertragsrechts entsprechen müssen, weitere Kosten mit sich. Die bisherige Harmonisierung des Verbraucherschutzrechts auf Unionsebene hat zwar in einigen Bereichen zu einer gewissen Annäherung geführt, doch bestehen zwischen den Rechtsvorschriften der Mitgliedstaaten nach wie vor erhebliche Unterschiede, da die Mitgliedstaaten im Rahmen der bisherigen Harmonisierung in vielen Fällen die Möglichkeit hatten zu entscheiden, wie sie dem Unionsrecht nachkommen und wo sie das Verbraucherschutzniveau ansetzen wollen.

(4) Die vertragsrechtsbedingten Hindernisse, die es Unternehmern unmöglich machen, das Potenzial des Binnenmarkts voll auszuschöpfen, wirken sich auch zum Nachteil der Verbraucher aus. Weniger grenzübergreifender Handel führt zu weniger Importen und weniger Wettbewerb. Die Verbraucher werden möglicherweise durch eine geringere Produktauswahl zu höheren Preisen benachteiligt, zum einen, weil ihnen weniger ausländische Unternehmer ihre Waren und Dienstleistungen direkt anbieten, und zum

[19] ABl. L 177 vom 4.7.2008, S. 6.

anderen als indirekte Folge des beschränkten grenzübergreifenden Handels zwischen Unternehmen auf der Großhandelsstufe. Obwohl ein Einkauf im Ausland erhebliche wirtschaftliche Vorteile in Form eines größeren und besseren Angebots mit sich bringen könnte, kaufen viele Verbraucher auch deshalb nur ungern jenseits der Grenze ein, weil sie unsicher sind, welche Rechte sie dort haben. Einige der wichtigsten Sorgen der Verbraucher betreffen das Vertragsrecht, zum Beispiel die Frage, ob sie angemessenen Schutz genießen würden, wenn sich die gekauften Produkte als fehlerhaft erweisen. Infolgedessen kaufen viele Verbraucher lieber im Inland ein, auch wenn das für sie eine geringere Auswahl und höhere Preise bedeutet.

(5) Zudem können Verbraucher, die die Preisunterschiede zwischen den Mitgliedstaaten nutzen und bei einem Unternehmer aus einem anderen Mitgliedstaat kaufen wollen, dies häufig nicht tun, weil der Unternehmer nicht ins Ausland liefert. Der elektronische Geschäftsverkehr hat zwar die Suche nach Angeboten und den Vergleich von Preisen und anderen Bedingungen unabhängig vom Ort der Niederlassung des Unternehmers erheblich erleichtert, doch lehnen Unternehmer, die nicht in den grenzübergreifenden Handel einsteigen wollen, sehr häufig Bestellungen ausländischer Verbraucher ab.

(6) Unterschiede im Vertragsrecht der Mitgliedstaaten hindern Verbraucher und Unternehmer daran, die Vorteile des Binnenmarkts zu nutzen. Diese vertragsrechtsbedingten Hindernisse wären wesentlich geringer, wenn Verträge unabhängig vom Ort der Niederlassung der Parteien auf ein einziges, einheitliches Vertragsrecht gestützt werden könnten. Ein solches einheitliches Vertragsrecht sollte den ganzen Lebenszyklus eines Vertrags umfassen und somit die für den Vertragsschluss wichtigsten Fragestellungen regeln. Es sollte darüber hinaus vollständig harmonisierte Verbraucherschutzvorschriften enthalten.

(7) Die Unterschiede im Vertragsrecht der Mitgliedstaaten und ihre Folgen für den grenzübergreifenden Handel wirken sich auch dahingehend aus, dass der Wettbewerb begrenzt bleibt. Weniger grenzübergreifender Handel bedeutet weniger Wettbewerb und damit weniger Anreize für Unternehmer, innovationsfreudiger zu werden und die Qualität ihrer Produkte zu verbessern oder die Preise zu senken. Vor allem in kleineren Mitgliedstaaten mit einer begrenzten Zahl inländischer Wettbewerber kann die Entscheidung ausländischer Unternehmer, wegen Kosten und Komplexität nicht in den Markt einzutreten, den Wettbewerb begrenzen, was spürbare Auswirkungen auf Auswahl und Preis der verfügbaren Produkte hat. Zudem können die Hindernisse für den grenzübergreifenden Handel den Wettbewerb zwischen KMU und größeren Unternehmen gefährden. Angesichts des erheblichen Gewichts der Transaktionskosten im Verhältnis zum Umsatz ist zu erwarten, dass ein KMU eher auf den Eintritt in einen ausländischen Markt verzichtet als ein größerer Wettbewerber.

(8) Um diese vertragsrechtsbedingten Hindernisse zu überwinden, sollten die Parteien die Möglichkeit haben, ihren Vertrag auf der Grundlage eines einzigen, einheitlichen Vertragsrechts, eines Gemeinsamen Europäischen Kaufrechts, zu schließen, dessen Bestimmungen in allen Mitgliedstaaten dieselbe Bedeutung haben und einheitlich ausgelegt werden. Das Gemeinsame Europäische Kaufrecht sollte den Parteien eine zusätzliche Wahlmöglichkeit bieten, die sie nutzen können, wenn beide der Auffassung sind, dass es dazu beitragen kann, den grenzübergreifenden Handel zu erleichtern und Transaktions- und Opportunitätskosten sowie andere vertragsrechtsbedingte Hindernisse für den grenzübergreifenden Handel zu reduzieren.

Es sollte nur dann Grundlage eines Vertragsverhältnisses werden, wenn die Parteien gemeinsam beschließen, darauf zurückzugreifen.

(9) Mit dieser Verordnung wird ein Gemeinsames Europäisches Kaufrecht eingeführt. Die Harmonisierung des Vertragsrechts der Mitgliedstaaten wird nicht durch eine Änderung des bestehenden innerstaatlichen Vertragsrechts bewirkt, sondern durch Schaffung einer fakultativen zweiten Vertragsrechtsregelung in jedem Mitgliedstaat für in ihren Anwendungsbereich fallende Verträge. Diese zweite Vertragsrechtsregelung soll in der ganzen EU gleich sein und parallel zum bestehenden innerstaatlichen Vertragsrecht Anwendung finden. Das Gemeinsame Europäische Kaufrecht soll auf freiwilliger Basis auf grenzübergreifende Verträge angewendet werden, wenn die Vertragsparteien dies ausdrücklich beschließen.

(10) Die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts sollte eine Wahl sein, die innerhalb des einzelstaatlichen Rechts getroffen wird, das nach der Verordnung (EG) Nr. 593/2008 beziehungsweise in Bezug auf vorvertragliche Informationspflichten nach der Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 über das auf außervertragliche Schuldverhältnisse anzuwendende Recht (Verordnung (EG) Nr. 864/2007)[20] oder nach jeder anderen einschlägigen Kollisionsnorm anwendbar ist. Die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts sollte daher keine Rechtswahl im Sinne der Kollisionsnormen darstellen und nicht mit einer solchen verwechselt werden; sie sollte unbeschadet der Kollisionsnormen gelten. Diese Verordnung lässt bestehende Kollisionsnormen somit unberührt.

(11) Das Gemeinsame Europäische Kaufrecht sollte einen vollständigen Satz voll harmonisierter zwingender Verbraucherschutzvorschriften enthalten. Diese Vorschriften sollten gemäß Artikel 114 Absatz 3 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) im Bereich Verbraucherschutz ein hohes Schutzniveau garantieren, um das Vertrauen der Verbraucher in das Gemeinsame Europäische Kaufrecht zu stärken, und ihnen so einen Anreiz bieten, auf dieser Grundlage grenzübergreifende Verträge zu schließen. Das Schutzniveau, das Verbraucher auf der Grundlage des EU-Verbraucherrechts genießen, sollte beibehalten oder erhöht werden.

(12) Da das Gemeinsame Europäische Kaufrecht einen vollständigen Satz voll harmonisierter zwingender Verbraucherschutzvorschriften enthält, werden in diesem Bereich keine Disparitäten zwischen den Rechtsvorschriften der Mitgliedstaaten auftreten, wenn sich die Parteien für die Verwendung des Gemeinsamen Europäischen Kaufrechts entschieden haben. Im Falle eines Verbrauchervertrags, bei dem der Verbraucher seinen gewöhnlichen Aufenthalt in einem Mitgliedstaat hat und die Parteien eine gültige Vereinbarung dahingehend getroffen haben, dass das Recht des Mitgliedstaats des Verkäufers und das Gemeinsame Europäische Kaufrecht Anwendung finden sollen, entfaltet Artikel 6 Absatz 2 der Verordnung (EG) Nr. 593/2008, der von einem unterschiedlichen Verbraucherschutzniveau in den Mitgliedstaaten ausgeht, für Fragen, die das Gemeinsame Europäische Kaufrecht regelt, folglich keine praktische Bedeutung.

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[20] ABl. L 199 vom 31.7.2007, S. 40.

(13) Das Gemeinsame Europäische Kaufrecht sollte für grenzübergreifende Verträge zur Verfügung stehen, denn gerade hier entstehen aufgrund der Unterschiede zwischen den Rechtsordnungen der Mitgliedstaaten Komplikationen und zusätzliche Kosten, die Parteien vom Vertragsschluss abhalten. Die Feststellung, ob es sich um einen grenzübergreifenden Vertrag handelt, sollte bei Verträgen zwischen Unternehmen anhand des gewöhnlichen Aufenthalts der Parteien erfolgen. In einem Vertrag zwischen einem Unternehmen und einem Verbraucher sollte der grenzübergreifende Bezug dann gegeben sein, wenn entweder die vom Verbraucher angegebene allgemeine Anschrift, die Lieferanschrift oder die vom Verbraucher angegebene Rechnungsanschrift in einem Mitgliedstaat, aber außerhalb des Staates liegt, in dem der Unternehmer seinen gewöhnlichen Aufenthalt hat.

(14) Das Gemeinsame Europäische Kaufrecht sollte nicht auf grenzübergreifende Sachverhalte beschränkt sein, die nur Mitgliedstaaten betreffen, sondern auch zur Erleichterung des Handels zwischen Mitgliedstaaten und Drittstaaten zur Verfügung stehen. Bei Verbrauchern aus Drittstaaten sollte die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts, die die Wahl eines für sie fremden Rechts implizieren würde, den geltenden Kollisionsnormen unterliegen.

(15) Auch Unternehmer, die sowohl im Inland als auch im Ausland Geschäftsbeziehungen unterhalten, sehen es unter Umständen als nützlich an, für alle Geschäfte einen einzigen, einheitlichen Vertrag zu verwenden. Es sollte den Mitgliedstaaten daher freistehen, das Gemeinsame Europäische Kaufrecht auch zur Anwendung in einem ausschließlich inländischen Kontext anzubieten.

(16) Das Gemeinsame Europäische Kaufrecht sollte insbesondere für den Kauf von Waren zur Verfügung stehen, einschließlich für Waren, die noch hergestellt oder erzeugt werden müssen, da dies der wirtschaftlich wichtigste Vertragstyp ist, der im grenzübergreifenden Handel und vor allem im elektronischen Geschäftsverkehr ein besonderes Wachstumspotenzial bietet.

(17) Um der zunehmenden Bedeutung der digitalen Wirtschaft Rechnung zu tragen, sollte das Gemeinsame Europäische Kaufrecht auch Verträge über die Bereitstellung digitaler Inhalte erfassen. Die Übertragung von zur Speicherung, Verarbeitung, Bereitstellung oder wiederholten Nutzung bestimmten digitalen Inhalten – wie Download von Musikdateien – hat rasch zugenommen und birgt ein großes Potenzial für weiteres Wachstum, doch ist die Rechtslage in diesem Bereich nach wie vor sehr uneinheitlich und ungewiss. Das Gemeinsame Europäische Kaufrecht sollte daher auch für die Bereitstellung digitaler Inhalte gelten, unabhängig davon, ob die digitalen Inhalte auf einem materiellen Datenträger bereitgestellt werden.

(18) Digitale Inhalte werden häufig nicht gegen Zahlung eines Preises, sondern in Verbindung mit separat bezahlten Waren oder Dienstleistungen bereitgestellt, wobei die Bereitstellung eine nicht geldwerte Gegenleistung wie die Einräumung des Zugangs zu persönlichen Daten voraussetzen oder ohne jede Gegenleistung im Rahmen einer Marketingstrategie erfolgen kann, die auf der Erwartung basiert, dass der Verbraucher später zusätzliche oder anspruchsvollere digitale Inhalte erwerben wird. Angesichts dieser besonderen Marktstruktur und des Umstands, dass mangelhafte digitale Inhalte die wirtschaftlichen Interessen des Verbrauchers schädigen können ungeachtet der Bedingungen, unter denen die Inhalte geliefert worden sind, sollte die Verfügbarkeit des Gemeinsamen Europäischen Kaufrechts

nicht davon abhängen, ob für die betreffenden digitalen Inhalte ein Preis gezahlt wird oder nicht.

(19) Um den Nutzen des Gemeinsamen Europäischen Kaufrechts zu maximieren, sollte sein materieller Anwendungsbereich auch vom Verkäufer erbrachte Dienstleistungen – hauptsächlich Reparatur, Wartung, Montage und Installierung – umfassen, die unmittelbar und eng mit den jeweiligen Waren oder digitalen Inhalten verbunden sind, die auf der Grundlage des Gemeinsamen Europäischen Kaufrechts geliefert werden, und häufig gleichzeitig im selben Vertrag oder in einem verbundenen Vertrag festgelegt sind.

(20) Das Gemeinsame Europäische Kaufrecht sollte nicht für verbundene Verträge gelten, auf deren Grundlage der Käufer Waren oder Dienstleistungen von einem Dritten bezieht. Dies wäre deshalb nicht angemessen, weil der Dritte nicht der Vereinbarung zwischen den Vertragsparteien über die Verwendung des Gemeinsamen Europäischen Kaufrechts angehört. Ein verbundener Vertrag mit einem Dritten sollte daher dem innerstaatlichen Recht unterliegen, das nach den Verordnungen (EG) Nr. 593/2008 und (EG) Nr. 864/2007 oder einer anderen einschlägigen Kollisionsnorm anwendbar ist.

(21) Um die bestehenden Probleme im Binnenmarkt und Wettbewerb auf gezielte und verhältnismäßige Weise angehen zu können, sollte der persönliche Geltungsbereich des Gemeinsamen Europäischen Kaufrechts auf die Parteien ausgerichtet werden, die derzeit durch die divergierenden einzelstaatlichen Vertragsrechtsregelungen davon abgehalten werden, im Ausland Geschäfte zu tätigen, was erhebliche negative Folgen für den grenzübergreifenden Handel hat. Erfasst werden sollten daher alle Verträge zwischen Unternehmen und Verbrauchern sowie Verträge zwischen Unternehmen, bei denen mindestens eine Partei ein KMU im Sinne der Empfehlung 2003/361/EG der Kommission vom 6. Mai 2003 betreffend die Definition der Kleinstunternehmen sowie der kleinen und mittleren Unternehmen[21] ist. Die Möglichkeit der Mitgliedstaaten, Vorschriften zu erlassen, die den Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts auf Verträge zwischen Unternehmen erweitern, von denen keines ein KMU ist, sollte hiervon jedoch unberührt bleiben. Unternehmer genießen im Geschäftsverkehr untereinander in jedem Fall uneingeschränkte Vertragsfreiheit und sind aufgerufen, sich bei ihrer Vertragsgestaltung am Gemeinsamen Europäischen Kaufrecht zu orientieren.

(22) Für die Anwendung des Gemeinsamen Europäischen Kaufrechts bedarf es einer entsprechenden Vereinbarung der Vertragsparteien. In Verträgen zwischen Unternehmen und Verbrauchern sollten an diese Vereinbarung strenge Anforderungen gestellt werden. Da es in der Praxis in der Regel der Unternehmer sein wird, der die Verwendung des Gemeinsamen Europäischen Kaufrechts vorschlägt, muss sich der Verbraucher voll darüber im Klaren sein, dass er der Verwendung von Vorschriften zustimmt, die sich von seinem bestehenden innerstaatlichen Recht unterscheiden. Die Zustimmung des Verbrauchers zur Verwendung des Gemeinsamen Europäischen Kaufrechts sollte daher nur in Form einer ausdrücklichen Erklärung gültig sein, die gesondert von der Zustimmung zum Abschluss des Vertrags abzugeben ist. Es sollte deshalb nicht möglich sein, die Verwendung des Gemeinsamen Europäischen

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[21] ABl. L 124 vom 20.5.2003, S. 36.

Kaufrechts in einer Bestimmung des zu schließenden Vertrags, insbesondere in den allgemeinen Geschäftsbedingungen des Unternehmers, anzubieten. Der Unternehmer sollte dem Verbraucher eine Bestätigung der Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts auf einem dauerhaften Datenträger zur Verfügung stellen.

(23) Der Verbraucher sollte der Verwendung des Gemeinsamen Europäischen Kaufrechts nicht nur bewusst, sondern auch in voller Sachkenntnis zustimmen. Der Unternehmer sollte den Verbraucher daher nicht nur auf die beabsichtigte Verwendung des Gemeinsamen Europäischen Kaufrechts hinweisen, sondern ihn auch über dessen Besonderheiten und wichtigste Merkmale informieren. Um den Unternehmern diese Aufgabe zu erleichtern und ihnen unnötigen Verwaltungsaufwand zu ersparen, wird ihnen in dieser Verordnung ein Standard-Informationsblatt in allen Amtssprachen der Europäischen Union zur Verfügung gestellt, das in Bezug auf Umfang und Qualität der Informationen eine einheitliche Unterrichtung der Verbraucher gewährleistet und das sie den Verbrauchern zukommen lassen sollten. Ist es nicht möglich, dem Verbraucher das Informationsblatt zu übermitteln, beispielsweise bei einem Telefongespräch, oder hat es der Unternehmer versäumt, das Informationsblatt zu übermitteln, sollte die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts für den Verbraucher erst dann verbindlich sein, wenn er das Informationsblatt zusammen mit der Bestätigung der Vereinbarung erhalten und anschließend seine Zustimmung erteilt hat.

(24) Um eine selektive Anwendung einzelner Bestimmungen des Gemeinsamen Europäischen Kaufrechts zu vermeiden, die das Gleichgewicht zwischen den Rechten und Verpflichtungen der Parteien beeinträchtigen und sich nachteilig auf das Verbraucherschutzniveau auswirken könnten, sollte die Wahl für das Gemeinsame Europäische Kaufrecht insgesamt gelten und nicht nur für bestimmte Teile.

(25) In den Fällen, in denen für den betreffenden Vertrag andernfalls das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf gelten würde, sollte die Wahl des Gemeinsamen Europäischen Kaufrechts eine Vereinbarung der Vertragsparteien dahingehend implizieren, dass die Anwendung dieses Übereinkommens ausgeschlossen wird.

(26) Das Gemeinsame Europäische Kaufrecht sollte vertragsrechtliche Sachverhalte regeln, die während des Lebenszyklus von Verträgen, die in seinen materiellen und persönlichen Geltungsbereich fallen, insbesondere von Online-Verträgen, von praktischer Bedeutung sind. Außer den Rechten und Verpflichtungen der Parteien und den Abhilfen bei Nichterfüllung sollte das Gemeinsame Europäische Kaufrecht deshalb Folgendes regeln: die vorvertraglichen Informationspflichten, den Abschluss des Vertrags einschließlich der Formerfordernisse, das Widerrufsrecht und seine Folgen, die Anfechtung des Vertrags wegen Irrtums, arglistiger Täuschung, Drohung oder unfairer Ausnutzung und ihre Folgen, Auslegung, Inhalt und Wirkungen des Vertrags, Beurteilung der Unfairness einer Vertragsbestimmung und ihre Folgen, Rückabwicklung nach Anfechtung und Beendigung des Vertrags sowie Verjährung und Ausschluss von Rechten. Es sollte zudem die verfügbaren Sanktionen im Fall einer Verletzung von Verpflichtungen und Pflichten in seinem Geltungsbereich regeln.

(27) Alle vertraglichen und außervertraglichen Sachverhalte, die nicht im Gemeinsamen Europäischen Kaufrecht geregelt sind, unterliegen dem außerhalb des Gemeinsamen

Kaufrechts bestehenden innerstaatlichen Recht, das nach Maßgabe der Verordnungen (EG) Nr. 593/2008 und (EG) Nr. 864/2007 oder nach sonstigen einschlägigen Kollisionsnormen anwendbar ist. Hierzu zählen unter anderem die Frage der Rechtspersönlichkeit, die Ungültigkeit eines Vertrags wegen Geschäftsunfähigkeit, Rechts- oder Sittenwidrigkeit, die Bestimmung der Vertragssprache, das Diskriminierungsverbot, die Stellvertretung, die Schuldner- und Gläubigermehrheit, der Wechsel der Parteien einschließlich Abtretung, die Aufrechnung und Konfusion, das Sachenrecht einschließlich der Eigentumsübertragung, das Recht des geistigen Eigentums sowie das Deliktsrecht. Auch die Frage, ob konkurrierende Ansprüche aus vertraglicher und außervertraglicher Haftung zusammen verfolgt werden können, ist nicht Gegenstand des Gemeinsamen Europäischen Kaufrechts.

(28) Das Gemeinsame Europäische Kaufrecht sollte keine Sachverhalte außerhalb des Vertragsrechts regeln. Diese Verordnung sollte diesbezügliches Unionsrecht oder innerstaatliches Recht unberührt lassen. Beispielsweise sollten Informationspflichten, die zum Schutz der Gesundheit oder der Umwelt oder aus Gründen der Sicherheit auferlegt werden, nicht in das Gemeinsame Europäische Kaufrecht aufgenommen werden. Ferner sollte diese Verordnung nicht die Informationspflichten nach der Richtlinie 2006/123/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über Dienstleistungen im Binnenmarkt[22] berühren.

(29) Bei Bestehen einer gültigen Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts sollte nur das Gemeinsame Kaufrecht für die in seinen Anwendungsbereich fallenden Sachverhalte maßgebend sein. Das Gemeinsame Kaufrecht sollte autonom im Einklang mit den etablierten Auslegungsgrundsätzen des Unionsrechts ausgelegt werden. Fragen zu Sachverhalten, die in den Anwendungsbereich des Gemeinsamen Kaufrechts fallen, die aber dort nicht ausdrücklich geregelt sind, sollten im Wege der Auslegung ohne Rückgriff auf ein anderes Rechtssystem geklärt werden. Das Gemeinsame Kaufrecht sollte anhand der zugrunde liegenden Prinzipien, Zielsetzungen und all seiner Vorschriften ausgelegt werden.

(30) Das Gemeinsame Europäische Kaufrecht sollte vom Grundsatz der Vertragsfreiheit geleitet sein. Die Parteiautonomie sollte nur eingeschränkt werden, soweit dies insbesondere aus Gründen des Verbraucherschutzes unerlässlich ist. In den Fällen, in denen diese Notwendigkeit gegeben ist, sollte deutlich auf den zwingenden Charakter der betreffenden Vorschriften hingewiesen werden.

(31) Die Parteien sollten sich bei ihrer Zusammenarbeit vom Gebot von Treu und Glauben und vom Grundsatz des redlichen Geschäftsverkehrs leiten lassen. Bestimmte Vorschriften stellen konkrete Ausprägungen dieser allgemeinen Grundsätze dar und sollten ihnen daher vorgehen. Die besonderen Rechte und Verpflichtungen der Parteien, wie sie in den spezifischen Bestimmungen festgelegt sind, sollten daher nicht unter Berufung auf die allgemeinen Grundsätze abgeändert werden können. Die konkreten Anforderungen, die aus dem Gebot von Treu und Glauben und dem Grundsatz des redlichen Geschäftsverkehrs erwachsen, sollten unter anderem von der Sachkunde der Parteien abhängen und sollten daher in Geschäften zwischen Unternehmen und Verbrauchern anders beschaffen sein als in Geschäften zwischen

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[22] ABl. L 376 vom 27.12.2006, S. 36.

Unternehmen. In Geschäften zwischen Unternehmen sollte es dabei auch auf die gute Handelspraxis in der betreffenden Situation ankommen.

(32) Das Gemeinsame Europäische Kaufrecht sollte auf die Aufrechterhaltung eines gültigen Vertrags ausgerichtet sein, wo immer dies mit Blick auf die berechtigten Interessen der Parteien möglich und angemessen ist.

(33) Das Gemeinsame Europäische Kaufrecht sollte unter Berücksichtigung der berechtigten Interessen der Parteien ausgewogene Lösungen für die Gestaltung und Ausübung der im Falle der Nichterfüllung des Vertrags verfügbaren Abhilfen bereithalten. In Verträgen zwischen Unternehmen und Verbrauchern sollte dem Umstand Rechnung getragen werden, dass die Vertragswidrigkeit von Waren, digitalen Inhalten oder Dienstleistungen in den Verantwortungsbereich des Unternehmers fällt.

(34) Um die Rechtsprechung des Gerichtshofs der Europäischen Union und der einzelstaatlichen Gerichte zur Auslegung des Gemeinsamen Europäischen Kaufrechts oder einer anderen Bestimmung dieser Verordnung der Öffentlichkeit zugänglich zu machen und so die Rechtssicherheit zu erhöhen, sollte die Kommission eine Datenbank mit den einschlägigen rechtskräftigen Entscheidungen dieser Gerichte einrichten. Damit die Kommission diesem Auftrag nachkommen kann, sollten die Mitgliedstaaten dafür sorgen, dass der Kommission die einschlägigen Entscheidungen ihrer Gerichte rasch übermittelt werden.

(35) Es empfiehlt sich, die Funktionsweise des Gemeinsamen Europäischen Kaufrechts oder anderer Bestimmungen dieser Verordnung nach fünf Jahren Anwendung zu überprüfen. Bei dieser Überprüfung sollte unter anderem festgestellt werden, inwieweit der Anwendungsbereich der Verordnung in Bezug auf Verträge zwischen Unternehmen sowie hinsichtlich der Markt- und technologischen Entwicklungen bei digitalen Inhalten und der künftigen Entwicklungen des Unionsrechts ausgeweitet werden muss.

(36) Da das Ziel dieser Verordnung, nämlich einen Beitrag zum reibungslosen Funktionieren des Binnenmarkts in der Form zu leisten, dass ein einheitliches Vertragsrecht zur Verfügung gestellt wird, das für grenzübergreifende Geschäfte in der Europäischen Union verwendet werden kann, von den Mitgliedstaaten allein nicht in ausreichendem Maße erreicht werden kann, sondern sich besser auf Unionsebene verwirklichen lässt, kann die Union im Einklang mit dem Subsidiaritätsgrundsatz in Artikel 5 des Vertrags über die Europäische Union tätig werden. Entsprechend dem in demselben Artikel genannten Grundsatz der Verhältnismäßigkeit geht diese Verordnung nicht über das zur Erreichung dieses Ziels erforderliche Maß hinaus.

(37) Diese Verordnung wahrt die Grundrechte und Grundsätze, wie sie unter anderem in der Charta der Grundrechte der Europäischen Union verankert sind, insbesondere deren Artikel 16, 38 und 47 –

HABEN FOLGENDE VERORDNUNG ERLASSEN:

Artikel 1
Ziel und Gegenstand

1. Zweck dieser Verordnung ist es, die Voraussetzungen für die Errichtung und das Funktionieren des Binnenmarkts zu verbessern, indem ein für die Europäische Union einheitliches Vertragsrecht (das „Gemeinsame Europäische Kaufrecht“) zur Verfügung gestellt wird, das in Anhang I dargestellt ist. Dieses Vertragsrecht kann bei grenzübergreifenden Geschäften verwendet werden, die den Kauf von Waren, die Bereitstellung digitaler Inhalte und die Erbringung verbundener Dienstleistungen betreffen, wenn die Parteien eines Vertrags dies vereinbaren.

2. Diese Verordnung ermöglicht es Unternehmern, sich bei allen ihren grenzübergreifenden Geschäften auf gemeinsame Vorschriften zu stützen und dieselben Vertragsbestimmungen zu verwenden, und hilft so, unnötige Kosten zu sparen und gleichzeitig ein hohes Maß an Rechtssicherheit herzustellen.

3. Für Verträge zwischen Unternehmern und Verbrauchern enthält diese Verordnung umfassende Verbraucherschutzvorschriften, um ein hohes Verbraucherschutzniveau zu gewährleisten, das Vertrauen der Verbraucher in den Binnenmarkt zu stärken und die Verbraucher zu Einkäufen im Ausland zu ermutigen.

Artikel 2
Begriffsbestimmungen

Für die Zwecke dieser Verordnung bezeichnet der Ausdruck

(a) „Vertrag“ eine Vereinbarung, die darauf abzielt, Verpflichtungen oder andere rechtliche Wirkungen herbeizuführen;

(b) „Treu und Glauben und redlicher Geschäftsverkehrs“ ein Verhaltensmaßstab, der durch Redlichkeit, Offenheit und Rücksicht auf die Interessen der anderen Partei in Bezug auf das fragliche Geschäft oder Rechtsverhältnis gekennzeichnet ist;

(c) „Verlust“ den materiellen Verlust sowie den immateriellen Verlust in Form erlittener Schmerzen und erlittenen Leids, ausgenommen jedoch andere Formen des immateriellen Verlusts wie Beeinträchtigungen der Lebensqualität oder entgangene Freude;

(d) „Standardvertragsbestimmungen“ Vertragsbestimmungen, die vorab für mehrere Geschäfte und verschiedene Vertragsparteien verfasst und im Sinne von Artikel 7 des Gemeinsamen Europäischen Kaufrechts nicht individuell von den Vertragsparteien ausgehandelt wurden;

(e) „Unternehmer“ jede natürliche oder juristische Person, die für die Zwecke ihrer gewerblichen, geschäftlichen, handwerklichen oder beruflichen Tätigkeit handelt;

(f) „Verbraucher“ jede natürliche Person, die nicht für die Zwecke einer gewerblichen, geschäftlichen, handwerklichen oder beruflichen Tätigkeit handelt;

(g) „Schadensersatz“ einen Geldbetrag, zu dem eine Person als Entschädigung für einen erlittenen Verlust oder einen körperlichen oder sonstigen Schaden berechtigt sein kann;

(h) „Waren“ bewegliche körperliche Gegenstände, ausgenommen:

i) Strom und Erdgas sowie

ii) Wasser und andere Formen von Gas, es sei denn, sie werden in einem begrenzten Volumen oder in einer bestimmten Menge zum Verkauf angeboten;

(i) „Preis“ Geld, das im Austausch für eine gekaufte Ware, für bereitgestellte digitale Inhalte oder eine erbrachte verbundene Dienstleistung geschuldet ist;

(j) „digitale Inhalte“ Daten, die – gegebenenfalls auch nach Kundenspezifikationen – in digitaler Form hergestellt und bereitgestellt werden, darunter Video-, Audio-, Bild- oder schriftliche Inhalte, digitale Spiele, Software und digitale Inhalte, die eine Personalisierung bestehender Hardware oder Software ermöglichen, jedoch ausgenommen:

i) elektronische Finanzdienstleistungen, einschließlich Online-Banking,

ii) Rechts- oder Finanzberatungsleistungen, die in elektronischer Form erbracht werden,

iii) elektronische Gesundheitsdienstleistungen,

iv) elektronische Kommunikationsdienste und -netze mit den dazugehörigen Einrichtungen und Diensten,

v) Glücksspiele,

vi) die Erstellung neuer digitaler Inhalte oder die Veränderung vorhandener digitaler Inhalte durch den Verbraucher oder jede sonstige Interaktion mit den Schöpfungen anderer Nutzer;

(k) „Kaufvertrag“ einen Vertrag, nach dem der Unternehmer (der „Verkäufer“) das Eigentum an einer Ware auf eine andere Person (den „Käufer“) überträgt oder sich zur Übertragung des Eigentums an einer Ware auf den Käufer verpflichtet und der Käufer den Preis zahlt oder sich zur Zahlung des Preises verpflichtet, einschließlich Verträgen über die Lieferung von Waren, die noch hergestellt oder erzeugt werden müssen, und ausgenommen Verträge, die den Kauf zwangsversteigerter Waren betreffen oder auf sonstige Weise mit der Ausübung öffentlicher Gewalt verbunden sind;

(l) „Verbraucherkaufvertrag“ einen Kaufvertrag, bei dem der Verkäufer ein Unternehmer und der Käufer ein Verbraucher ist;

(m) „verbundene Dienstleistung“ jede Dienstleistung im Zusammenhang mit Waren oder digitalen Inhalten wie Montage, Installierung, Instandhaltung, Reparatur oder sonstige Handreichungen, die vom Verkäufer der Waren oder vom Lieferanten der digitalen Inhalte auf der Grundlage des Kaufvertrags, des Vertrags über die

Bereitstellung digitaler Inhalte oder auf der Grundlage eines gesonderten Vertrags über verbundene Dienstleistungen erbracht werden, der zeitgleich mit dem Kaufvertrag oder dem Vertrag über die Bereitstellung digitaler Inhalte geschlossen wurde, jedoch ausgenommen

i) Transportleistungen,

ii) Schulungen,

iii) Unterstützungsleistungen im Telekommunikationsbereich und

iv) Finanzdienstleistungen;

(n) „Dienstleister" einen Verkäufer von Waren oder Lieferanten digitaler Inhalte, der sich verpflichtet, für einen Verbraucher eine mit diesen Waren oder digitalen Inhalten verbundene Dienstleistung zu erbringen;

(o) „Kunde" jede Person, die eine verbundene Dienstleistung erwirbt;

(p) „Fernabsatzvertrag" jeden Vertrag zwischen einem Unternehmer und einem Verbraucher im Rahmen eines organisierten Fernabsatzsystems, der ohne gleichzeitige körperliche Anwesenheit des Unternehmers beziehungsweise, falls der Unternehmer eine juristische Person ist, der ihn vertretenden natürlichen Person und des Verbrauchers geschlossen wird, wobei bis zum Zeitpunkt des Vertragsschlusses ausschließlich ein oder mehrere Fernkommunikationsmittel verwendet werden;

(q) „außerhalb von Geschäftsräumen geschlossener Vertrag" jeden Vertrag zwischen einem Unternehmer und einem Verbraucher, der

i) bei gleichzeitiger körperlicher Anwesenheit des Unternehmers beziehungsweise, falls der Unternehmer eine juristische Person ist, der ihn vertretenden natürlichen Person und des Verbrauchers an einem Ort geschlossen wird, der kein Geschäftsraum des Unternehmers ist, oder der aufgrund eines Angebots des Verbrauchers unter denselben Umständen geschlossen wird, oder

ii) in den Geschäftsräumen des Unternehmers oder durch Fernkommunikationsmittel geschlossen wird, und zwar unmittelbar nachdem der Verbraucher an einem anderen Ort als den Geschäftsräumen des Unternehmers bei gleichzeitiger körperlicher Anwesenheit des Unternehmers beziehungsweise, falls der Unternehmer eine juristische Person ist, einer ihn vertretenden natürlichen Person und des Verbrauchers persönlich und individuell angesprochen wurde, oder

iii) auf einem Ausflug geschlossen wird, der von dem Unternehmer beziehungsweise, falls der Unternehmer eine juristische Person ist, von einer ihn vertretenden natürlichen Person organisiert wurde, wenn damit die Werbung für und der Verkauf von Waren, die Lieferung digitaler Inhalte beziehungsweise die Erbringung von Dienstleistungen an den Verbraucher bezweckt oder bewirkt wird;

(r) „Geschäftsräume"

i) unbewegliche Verkaufsstätten, in denen der Unternehmer seine Tätigkeit dauerhaft ausübt, oder

ii) bewegliche Verkaufsstätten, in denen der Unternehmer seine Tätigkeit regelmäßig ausübt;

(s) „gewerbliche Garantie" jedes vom Unternehmer oder Hersteller dem Verbraucher gegenüber zusätzlich zu seinen rechtlichen Verpflichtungen gemäß Artikel 106 im Falle von Vertragswidrigkeit eingegangene Versprechen, den Kaufpreis zu erstatten oder Waren beziehungsweise digitale Inhalte zu ersetzen, zu reparieren oder Kundendienstleistungen für sie zu erbringen, falls sie nicht die Eigenschaften aufweisen oder andere nicht mit der Vertragsmäßigkeit verbundene Anforderungen erfüllen sollten, die in der Garantieerklärung oder der einschlägigen Werbung, wie sie bei oder vor dem Abschluss des Vertrags verfügbar war, beschrieben sind;

(t) „dauerhafter Datenträger" jeden Datenträger, der es einer Partei gestattet, an sie persönlich gerichtete Informationen so zu speichern, dass sie sie in der Folge für eine für die Zwecke der Information angemessene Dauer einsehen kann, und der die unveränderte Wiedergabe der gespeicherten Informationen ermöglicht;

(u) „öffentliche Versteigerung" eine Verkaufsmethode, bei der der Unternehmer dem Verbraucher, der der Versteigerung persönlich beiwohnt oder dem diese Möglichkeit gewährt wird, Waren oder digitale Inhalte anbietet, und zwar in einem vom Versteigerer durchgeführten, auf konkurrierenden Geboten basierenden Verfahren, bei dem derjenige, der den Zuschlag erhalten hat, zum Erwerb der Waren oder digitalen Inhalte verpflichtet ist;

(v) „zwingende Vorschrift" jede Vorschrift, deren Anwendung die Parteien nicht ausschließen, von der sie nicht abweichen und deren Wirkung sie nicht abändern dürfen;

(w) „Gläubiger" eine Person, die ein Recht auf Erfüllung einer Verpflichtung finanzieller oder nicht finanzieller Natur gegen eine andere Person, den Schuldner, hat;

(x) „Schuldner" eine Person, die eine Verpflichtung finanzieller oder nicht finanzieller Natur gegen eine andere Person, den Gläubiger, hat;

(y) „Verpflichtung" eine Pflicht zu leisten, die eine Partei eines Rechtsverhältnisses einer anderen Partei schuldet.

Artikel 3
Fakultativer Charakter des Gemeinsamen Europäischen Kaufrechts

Die Parteien können vereinbaren, dass für ihre grenzübergreifenden Verträge über den Kauf von Waren oder die Bereitstellung digitaler Inhalte sowie die Erbringung verbundener Dienstleistungen innerhalb des in den Artikeln 4 bis 7 abgesteckten räumlichen, sachlichen und persönlichen Geltungsbereichs das Gemeinsame Europäische Kaufrecht gilt.

Artikel 4
Grenzübergreifende Verträge

1. Das Gemeinsame Europäische Kaufrecht kann für grenzübergreifende Verträge verwendet werden.

2. Für die Zwecke dieser Verordnung ist ein Vertrag zwischen Unternehmern ein grenzübergreifender Vertrag, wenn die Parteien ihren gewöhnlichen Aufenthalt in verschiedenen Staaten haben, von denen mindestens einer ein EU-Mitgliedstaat ist.

3. Für die Zwecke dieser Verordnung ist ein Vertrag zwischen einem Unternehmer und einem Verbraucher ein grenzübergreifender Vertrag, wenn

   (a) sich die Anschrift des Verbrauchers, die Lieferanschrift oder die Rechnungsanschrift in einem anderen Staat als dem Staat befindet, in dem der Unternehmer seinen gewöhnlichen Aufenthalt hat, und

   (b) mindestens einer dieser Staaten ein EU-Mitgliedstaat ist.

4. Für die Zwecke dieser Verordnung ist der Ort des gewöhnlichen Aufenthalts von Gesellschaften, Vereinen und juristischen Personen der Ort ihrer Hauptverwaltung. Der gewöhnliche Aufenthalt eines Unternehmers, bei dem es sich um eine natürliche Person handelt, ist der Hauptgeschäftssitz dieser Person.

5. Wird der Vertrag im Rahmen der Geschäftstätigkeit einer Zweigniederlassung, Agentur oder sonstigen Niederlassung eines Unternehmers geschlossen, so gilt der Ort, an dem sich die Zweigniederlassung, Agentur oder sonstige Niederlassung befindet, als gewöhnlicher Aufenthalt des Unternehmers.

6. Für die Einstufung eines Vertrags als grenzübergreifender Vertrag ist der Zeitpunkt maßgebend, zu dem die Verwendung des Gemeinsamen Europäischen Kaufrechts vereinbart wurde.

Artikel 5
Verträge, für die das Gemeinsame Europäische Kaufrecht verwendet werden kann

Das Gemeinsame Europäische Kaufrecht kann verwendet werden für:

a) Kaufverträge,

b) Verträge über die Bereitstellung digitaler Inhalte gleich, ob auf einem materiellen Datenträger oder nicht, die der Nutzer speichern, verarbeiten oder wiederverwenden kann oder zu denen er Zugang erhält, unabhängig davon, ob die Bereitstellung gegen Zahlung eines Preises erfolgt oder nicht,

c) Verträge über verbundene Dienstleistungen, gleich, ob hierfür ein gesonderter Preis vereinbart wurde oder nicht.

Artikel 6
Ausschluss von Mischverträgen und Verträgen, die mit einem Verbraucherkredit verbunden sind

1. Das Gemeinsame Europäische Kaufrecht darf nicht für Mischverträge verwendet werden, die neben dem Kauf von Waren, der Bereitstellung digitaler Inhalte und der Erbringung verbundener Dienstleistungen im Sinne von Artikel 5 noch andere Elemente beinhalten.

2. Das Gemeinsame Europäische Kaufrecht darf nicht für Verträge zwischen einem Unternehmer und einem Verbraucher verwendet werden, bei denen der Unternehmer dem Verbraucher einen Kredit in Form eines Zahlungsaufschubs, eines Darlehens oder einer vergleichbaren Finanzierungshilfe gewährt oder zu gewähren verspricht. Möglich ist die Verwendung des Gemeinsamen Europäischen Kaufrechts bei Verträgen zwischen einem Unternehmer und einem Verbraucher, bei denen Waren, digitale Inhalte oder verbundene Dienstleistungen gleicher Art regelmäßig geliefert, bereitgestellt oder erbracht und vom Verbraucher für die Dauer der Leistungen in Raten bezahlt werden.

Artikel 7
Vertragsparteien

1. Das Gemeinsame Europäische Kaufrecht darf nur verwendet werden, wenn der Verkäufer der Waren oder der Lieferant der digitalen Inhalte Unternehmer ist. Sind alle Parteien Unternehmer, kann das Gemeinsame Europäische Kaufrecht verwendet werden, wenn mindestens eine dieser Parteien ein kleines oder mittleres Unternehmen („KMU“) ist.

2. Für die Zwecke dieser Verordnung ist ein KMU ein Unternehmer, der

   (a) weniger als 250 Personen beschäftigt und

   (b) einen Jahresumsatz von höchstens 50 Mio. EUR oder eine Jahresbilanzsumme von höchstens 43 Mio. EUR hat beziehungsweise im Falle von KMU, die ihren gewöhnlichen Aufenthalt in einem Drittstaat oder in einem Mitgliedstaat haben, dessen Währung nicht der Euro ist, einen Jahresumsatz oder eine Jahresbilanzsumme, die den genannten Beträgen in der Währung des betreffenden Mitglied- oder Drittstaats entspricht.

Artikel 8
Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts

1. Die Verwendung des Gemeinsamen Europäischen Kaufrechts muss von den Parteien vereinbart werden. Das Bestehen einer solchen Vereinbarung und ihre Gültigkeit bestimmen sich nach den Absätzen 2 und 3 und nach Artikel 9 sowie nach den einschlägigen Bestimmungen des Gemeinsamen Europäischen Kaufrechts.

2. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher ist die Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts nur gültig, wenn der Verbraucher hierin ausdrücklich und gesondert von seiner Erklärung, mit der er dem Vertragsschluss zustimmt, einwilligt. Der Unternehmer übermittelt dem Verbraucher auf einem dauerhaften Datenträger eine Bestätigung dieser Vereinbarung.

3. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher darf das Gemeinsame Europäische Kaufrecht nicht in Teilen, sondern nur in seiner Gesamtheit verwendet werden.

Artikel 9
Standard-Informationsblatt bei Verträgen zwischen einem Unternehmer und einem Verbraucher

1. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher muss der Unternehmer zusätzlich zu den vorvertraglichen Informationspflichten gemäß dem Gemeinsamen Europäischen Kaufrecht den Verbraucher vor der Vereinbarung auf die beabsichtigte Verwendung des Gemeinsamen Europäischen Kaufrechts hinweisen, indem er ihm das Informationsblatt in Anhang II mit deutlichem Hinweis darauf übermittelt. Wird die Verwendung des Gemeinsamen Europäischen Kaufrechts telefonisch oder auf eine andere Weise vereinbart, die es nicht erlaubt, dem Verbraucher das Informationsblatt zu übermitteln, oder hat es der Unternehmer versäumt, das Informationsblatt zu übermitteln, so ist der Verbraucher erst dann an die Vereinbarung gebunden, wenn er die Bestätigung nach Artikel 8 Absatz 2 zusammen mit dem Informationsblatt erhalten und der Verwendung des Gemeinsamen Europäischen Kaufrechts daraufhin ausdrücklich zugestimmt hat.

2. Das in Absatz 1 genannte Informationsblatt wird, wenn es in elektronischer Form geliefert wird, über einen Hyperlink zugänglich gemacht oder enthält ansonsten die Adresse einer Website, über die der Text des Gemeinsamen Europäischen Kaufrechts kostenlos abgerufen werden kann.

Artikel 10
Sanktionen wegen Verletzung bestimmter Pflichten

Die Mitgliedstaaten legen Sanktionen für Verstöße gegen die in Artikel 8 und 9 niedergelegten Pflichten fest, die Unternehmern im Verhältnis zu Verbrauchern obliegen, und ergreifen alle erforderlichen Maßnahmen, um sicherzustellen, dass diese Sanktionen angewandt werden. Die Sanktionen müssen wirksam, verhältnismäßig und abschreckend sein. Die Mitgliedstaaten teilen der Kommission die einschlägigen Vorschriften spätestens [*1 Jahr nach Beginn der Anwendung dieser Verordnung*] und alle späteren Änderungen so bald wie möglich mit.

Artikel 11
Folgen der Verwendung des Gemeinsamen Europäischen Kaufrechts

Haben die Parteien eine gültige Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts für einen Vertrag getroffen, so ist nur das Gemeinsame Europäische Kaufrecht für die darin geregelten Fragen maßgebend. Sofern der Vertrag tatsächlich zustande gekommen ist, gilt das Gemeinsame Europäische Kaufrecht auch für die Erfüllung der vorvertraglichen Informationspflichten und die Abhilfen bei deren Verletzung.

Artikel 12
Informationspflichten aufgrund der Dienstleistungsrichtlinie

Diese Verordnung lässt die Informationspflichten unberührt, die in einzelstaatlichen Gesetzen zur Umsetzung der Richtlinie 2006/123/EG des Europäischen Parlaments und des Rates vom 12. Dezember 2006 über Dienstleistungen im Binnenmarkt festgelegt sind und die Informationspflichten des Gemeinsamen Europäischen Kaufrechts ergänzen.

Artikel 13

Optionen der Mitgliedstaaten

Ein Mitgliedstaat kann beschließen, dass das Gemeinsame Europäische Kaufrecht für Verträge verwendet werden darf,

a) wenn sich der gewöhnliche Aufenthalt der Unternehmer beziehungsweise im Falle eines Vertrags zwischen einem Unternehmer und einem Verbraucher der gewöhnliche Aufenthalt des Unternehmers, die Anschrift des Verbrauchers, die Lieferanschrift für die Waren oder die Rechnungsanschrift in diesem Mitgliedstaat befinden, und/oder

b) wenn alle Vertragsparteien Unternehmer sind, aber keiner davon ein KMU nach Maßgabe von Artikel 7 Absatz 2 ist.

Artikel 14

Übermittlung von Urteilen zur Anwendung dieser Verordnung

1. Die Mitgliedstaaten stellen sicher, dass rechtskräftige Urteile ihrer Gerichte zur Anwendung der Vorschriften dieser Verordnung unverzüglich der Kommission übermittelt werden.

2. Die Kommission richtet ein System ein, mit dem Informationen über die Urteile gemäß Absatz 1 sowie einschlägige Urteile des Gerichtshofs der Europäischen Union abgerufen werden können. Dieses System ist der Öffentlichkeit zugänglich.

Artikel 15

Überprüfung

1. Spätestens am … [*4 Jahre nach Beginn der Anwendung dieser Verordnung*] übermitteln die Mitgliedstaaten der Kommission Informationen über die Anwendung dieser Verordnung, insbesondere darüber, inwieweit das Gemeinsame Europäische Kaufrecht akzeptiert wird, seine Vorschriften Anlass zu Rechtsstreitigkeiten gaben und sich Unterschiede im Verbraucherschutzniveau auftun, je nachdem, ob das Gemeinsame Europäische Kaufrecht oder innerstaatliches Recht zur Anwendung kommt. Dazu gehört auch ein umfassender Überblick über die Rechtsprechung der mitgliedstaatlichen Gerichte zur Auslegung des Gemeinsamen Europäischen Kaufrechts.

2. Spätestens am … [*5 Jahre nach Beginn der Anwendung dieser Verordnung*] legt die Kommission dem Europäischen Parlament, dem Rat und dem Europäischen Wirtschafts- und Sozialausschuss einen ausführlichen Bericht vor, in dem das Funktionieren dieser Verordnung unter anderem unter Berücksichtigung der Notwendigkeit überprüft wird, ihren Anwendungsbereich in Bezug auf Verträge zwischen Unternehmen sowie hinsichtlich der Markt- und technologischen Entwicklungen bei digitalen Inhalten und der künftigen Entwicklungen des Unionsrechts auszuweiten.

Artikel 16
Inkrafttreten und Anwendung

1. Diese Verordnung tritt am zwanzigsten Tag nach ihrer Veröffentlichung im *Amtsblatt der Europäischen Union* in Kraft.

2. Sie gilt ab dem … [*6 Monate nach ihrem Inkrafttreten*].

Diese Verordnung ist in allen ihren Teilen verbindlich und gilt unmittelbar in jedem Mitgliedstaat.

Geschehen zu … am …

Im Namen des Europäischen Parlaments
Der Präsident

Im Namen des Rates
Der Präsident

ANHANG I
GEMEINSAMES EUROPÄISCHES KAUFRECHT

INHALTSVERZEICHNIS

Teil I Einleitende Bestimmungen

Kapitel 1 Allgemeine Grundsätze und Anwendung

ABSCHNITT 1 ALLGEMEINE GRUNDSÄTZE

Artikel 1
Vertragsfreiheit

1. Den Parteien steht es, vorbehaltlich einschlägiger zwingender Vorschriften, frei, einen Vertrag zu schließen und dessen Inhalt zu bestimmen.

2. Die Parteien können die Anwendung von Bestimmungen des Gemeinsamen Europäischen Kaufrechts ausschließen, davon abweichen oder ihre Wirkungen abändern, sofern in diesen Bestimmungen nichts anderes bestimmt ist.

Artikel 2
Treu und Glauben und redlicher Geschäftsverkehr

1. Jede Partei hat die Pflicht, im Einklang mit dem Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs zu handeln.

2. Verletzt eine Partei diese Pflicht, so kann sie das von der Ausübung oder Geltendmachung von Rechten, Abhilfen oder Einwänden, die ihr sonst zugestanden hätten, ausschließen, oder es kann sie für jeden Verlust, der der anderen Partei dadurch entsteht, haftbar machen.

3. Die Parteien dürfen die Anwendung dieses Artikels nicht ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 3
Zusammenarbeit

Die Parteien sind zur Zusammenarbeit miteinander verpflichtet, soweit dies im Hinblick auf die Erfüllung ihrer vertraglichen Verpflichtungen von ihnen erwartet werden kann.

ABSCHNITT 2 ANWENDUNG

Artikel 4
Auslegung

1. Das Gemeinsame Europäische Kaufrecht ist autonom und im Einklang mit den ihm zugrunde liegenden Zielen und Grundsätzen auszulegen.

2. Fragen, die in den Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts fallen, jedoch darin nicht ausdrücklich geregelt sind, sind im Einklang mit den ihm zugrunde liegenden Zielen und Grundsätzen und all seinen Bestimmungen und ohne Rückgriff auf das einzelstaatliche Recht, das in Ermangelung einer Vereinbarung über die Verwendung des Gemeinsamen Europäischen Kaufrechts anwendbar wäre, beziehungsweise auf jedes andere Recht zu regeln.

3. Sind eine allgemeine Vorschrift und eine besondere Vorschrift auf eine bestimmte Situation im Anwendungsbereich der allgemeinen Vorschrift anwendbar, so geht die besondere Vorschrift im Konfliktfall vor.

Artikel 5
Angemessenheit, Vernünftigkeit

1. Was „angemessen“ oder „vernünftig“ ist, ist objektiv unter Berücksichtigung der Art und des Zwecks des Vertrags, der Umstände des Einzelfalls und der Gebräuche und Gepflogenheiten der jeweiligen Gewerbe oder Berufe zu bestimmen.

2. Was eine Person erwarten oder von ihr oder in einer bestimmten Situation erwartet werden darf, ist das, was vernünftigerweise erwartet werden darf.

Artikel 6
Formfreiheit

Soweit das Gemeinsame Europäische Kaufrecht nichts anderes vorschreibt, brauchen Verträge, Erklärungen oder sonstige Handlungen, die ihm unterliegen, nicht in einer bestimmten Form vorgenommen oder nachgewiesen zu werden.

Artikel 7
Nicht individuell ausgehandelte Vertragsbestimmungen

1. Eine Vertragsbestimmung ist nicht individuell ausgehandelt, wenn sie von einer Partei gestellt wurde und die andere Partei nicht in der Lage war, ihren Inhalt zu beeinflussen.

2. Stellt eine Partei der anderen Partei eine Auswahl an Vertragsbestimmungen zur Verfügung, so wird die Bestimmung nicht allein deshalb als individuell ausgehandelt angesehen, weil die andere Partei diese Bestimmung ausgewählt hat.

3. Behauptet eine Partei, eine als Teil von Standardvertragsbestimmungen gestellte Vertragsbestimmung sei nach der erstmaligen Bereitstellung individuell ausgehandelt worden, so trägt diese Partei die Beweislast dafür.

4. In einem Vertrag zwischen einem Unternehmer und einem Verbraucher trägt der Unternehmer die Beweislast dafür, dass eine vom Unternehmer gestellte Vertragsbestimmung individuell ausgehandelt wurde.

5. In einem Vertrag zwischen einem Unternehmer und einem Verbraucher gelten von einem Dritten entworfene Vertragsbestimmungen als vom Unternehmer gestellt, es sei denn, sie wurden vom Verbraucher in den Vertrag eingebracht.

Artikel 8
Beendigung des Vertrags

1. Eine „Beendigung des Vertrags" beendet die Rechte und Verpflichtungen der Parteien aus dem Vertrag bis auf diejenigen, die sich aus einer Vertragsbestimmung über die Streitbeilegung oder einer anderen Vertragsbestimmung, die auch nach einer Beendigung des Vertrags anzuwenden ist, ergeben.

2. Bereits vor der Beendigung des Vertrags fällige Zahlungen und Schadensersatzleistungen wegen Nichterfüllung bleiben zu zahlen. Wird der Vertrag wegen Nichterfüllung oder zu erwartender Nichterfüllung beendet, so hat die den Vertrag beendende Partei anstelle der künftigen Erfüllung der anderen Partei auch Anspruch auf Schadensersatz.

3. Die Wirkungen einer Beendigung des Vertrags auf die Rückzahlung des Preises und die Rückgabe der Waren oder digitalen Inhalte sowie sonstige Wirkungen der Rückabwicklung bestimmen sich nach den Vorschriften des Kapitels 17 über die Rückabwicklung.

Artikel 9
Gemischte Verträge

1. Sieht ein Vertrag sowohl den Kauf von Waren oder die Bereitstellung digitaler Inhalte als auch die Erbringung einer verbundenen Dienstleistung vor, so gelten die Vorschriften von Teil IV für die Verpflichtungen und Abhilfen der Parteien als Verkäufer und Käufer von Waren oder digitalen Inhalten und die Vorschriften von Teil V für die Verpflichtungen und Abhilfen der Parteien als Dienstleister und Kunde.

2. Sind bei einem unter Absatz 1 fallenden Vertrag die Verpflichtungen des Verkäufers und Dienstleisters aus dem Vertrag in selbständigen Teilleistungen zu erfüllen oder auf andere Weise teilbar, so kann der Käufer und Kunde, wenn für einen Teil der Leistung, dem ein Preis zugeordnet werden kann, ein Beendigungsgrund wegen Nichterfüllung besteht, den Vertrag nur in Bezug auf diesen Teil beenden.

3. Absatz 2 gilt nicht, wenn vom Käufer und Kunden nicht erwartet werden kann, dass er die Leistung der anderen Teile annimmt, oder die Nichterfüllung die Beendigung des gesamten Vertrags rechtfertigt.

4. Sind die vertraglichen Verpflichtungen des Verkäufers und Dienstleisters nicht teilbar oder kann einem Teil der Leistung kein Preis zugeordnet werden, so kann der Käufer und Kunde den Vertrag nur beenden, wenn die Nichterfüllung die Beendigung des gesamten Vertrags rechtfertigt.

Artikel 10
Mitteilung

1. Dieser Artikel gilt für alle Mitteilungen für die Zwecke des Gemeinsamen Europäischen Kaufrechts und des Vertrags. Der Begriff „Mitteilung“ umfasst die Übermittlung jeder Erklärung, die darauf abzielt, Rechtswirkungen zu haben oder einem rechtlichen Zweck dienende Informationen weiterzugeben.

2. Eine Mitteilung kann auf jede nach den Umständen geeignete Weise abgegeben werden.

3. Eine Mitteilung wird wirksam, wenn sie dem Empfänger zugeht, es sei denn, sie bestimmt einen späteren Eintritt der Wirkung.

4. Eine Mitteilung geht dem Empfänger zu,

   (a) wenn sie dem Empfänger übermittelt wird,

   (b) wenn sie an seinen Geschäftssitz oder, falls er keinen Geschäftssitz hat oder die Mitteilung an einen Verbraucher gerichtet ist, an den Ort des gewöhnlichen Aufenthalts des Empfängers übermittelt wird,

   (c) wenn sie im Falle einer Mitteilung, die durch E-Mail oder eine sonstige individuelle elektronische Nachricht übermittelt wird, vom Empfänger abgerufen werden kann oder

   (d) wenn sie dem Empfänger anderweitig an einem Ort und in einer Weise zugänglich gemacht wird, dass ihr unverzüglicher Abruf durch den Empfänger erwartet werden kann.

   Die Mitteilung ist dem Empfänger zugegangen, wenn eine der unter den Buchstaben a, b, c und d genannten Voraussetzungen erfüllt ist, je nachdem, welcher Zeitpunkt der früheste ist.

5. Eine Mitteilung ist unwirksam, wenn ihre Rücknahme dem Empfänger vor oder gleichzeitig mit der Mitteilung zugeht.

6. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung der Absätze 3 und 4 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 11
Berechnung von Fristen

1. Die Bestimmungen dieses Artikels gelten für die Berechnung aller Fristen für die Zwecke des Gemeinsamen Europäischen Kaufrechts.

2. Vorbehaltlich der Absätze 3 bis 7

   (a) beginnt eine in Tagen bemessene Frist am Anfang der ersten Stunde des ersten Tages und endet mit dem Ablauf der letzten Stunde des letzten Tages der Frist;

(b) beginnt eine in Wochen, Monaten oder Jahren bemessene Frist am Anfang der ersten Stunde des ersten Tages der Frist und endet mit dem Ablauf der letzten Stunde desjenigen Tages der letzten Woche, des letzten Monates oder des letzten Jahres, der der gleiche Wochentag ist oder auf das gleiche Datum fällt wie der Tag, an dem die Frist beginnt, mit der Maßgabe, dass bei einer in Monaten oder Jahren bemessenen Frist, wenn der Tag, an dem die Frist enden würde, in dem letzten Monat fehlt, die Frist mit dem Ablauf der letzten Stunde des letzten Tages dieses Monats endet.

3. Ist eine in Tagen, Wochen, Monaten oder Jahren bemessene Frist von einem bestimmten Ereignis, einer bestimmten Handlung oder einem bestimmten Zeitpunkt an zu berechnen, so wird der Tag, an dem das Ereignis stattfindet, die Handlung erfolgt oder der Zeitpunkt eintritt, nicht als in diese Frist fallender Tag mitgerechnet.

4. Fristen umfassen Samstage, Sonntage und Feiertage, soweit sie nicht ausdrücklich ausgenommen oder die Fristen in Arbeitstagen bemessen sind.

5. Fällt der letzte Tag einer Frist auf einen Samstag, einen Sonntag oder einen Feiertag an dem Ort, wo eine festgelegte Handlung vorzunehmen ist, so endet die Frist mit dem Ablauf der letzten Stunde des folgenden Arbeitstages. Diese Bestimmung gilt nicht für Fristen, die von einem bestimmten Datum oder einem bestimmten Ereignis an rückwirkend berechnet werden.

6. Übersendet eine Person einer anderen ein Dokument, das eine Frist zur Antwort oder zur Vornahme einer anderen Handlung setzt, aber nicht angibt, wann die Frist beginnen soll, dann beginnt die Frist, wenn keine entgegenstehenden Anhaltspunkte vorliegen, zu dem Zeitpunkt zu laufen, zu dem das Dokument dem Empfänger zugeht.

7. Für die Zwecke dieses Artikels bezeichnet der Ausdruck

(a) „Feiertag“ mit Bezug auf einen Mitgliedstaat oder den Teil eines Mitgliedstaats der Europäischen Union jeden Tag, der als solcher für den Mitgliedstaat oder Teil dieses Mitgliedstaats in einer im Amtsblatt der Europäischen Union veröffentlichten Liste genannt ist, und

(b) „Arbeitstage“ alle Tage außer Samstagen, Sonntagen und Feiertagen.

Artikel 12
Einseitige Erklärungen oder einseitiges Verhalten

1. Eine einseitige Absichtserklärung wird so ausgelegt, wie erwartet werden kann, dass die Person, an die sie gerichtet ist, sie versteht.

2. Wollte die Person, die die Erklärung abgegeben hat, einem darin verwendeten Ausdruck eine bestimmte Bedeutung geben und kannte die andere Partei diesen Willen oder hätte sie ihn kennen müssen, so wird der Ausdruck so ausgelegt, wie die Person, die die Erklärung abgegeben hat, ihn verstanden wissen wollte.

3. Die Artikel 59 bis 65 sind auf die Auslegung einseitiger Absichtserklärungen entsprechend anwendbar.

4. Die Vorschriften des Kapitels 5 über Einigungsmängel sind auf die Auslegung einseitiger Absichtserklärungen entsprechend anwendbar.

5. Unter einer Erklärung im Sinne dieses Artikels ist auch ein Verhalten zu verstehen, das als einer Erklärung entsprechend betrachtet werden kann.

Teil II Zustandekommen eines bindenden Vertrags

Kapitel 2 Vorvertragliche Informationen

ABSCHNITT 1 VORVERTRAGLICHE INFORMATIONSPFLICHTEN DES UNTERNEHMERS IM VERHÄLTNIS ZUM VERBRAUCHER

Artikel 13
Informationspflicht beim Abschluss eines im Fernabsatz oder außerhalb von Geschäftsräumen geschlossenen Vertrags

1. Ein Unternehmer, der im Fernabsatz oder außerhalb von Geschäftsräumen einen Vertrag schließt, hat die Pflicht, den Verbraucher in klarer und verständlicher Form über Folgendes zu informieren, bevor der Vertrag geschlossen wird beziehungsweise bevor der Verbraucher an ein Angebot gebunden ist:

   (a) die wesentlichen Merkmale der Waren, digitalen Inhalte oder verbundenen Dienstleistungen, die geliefert, bereitgestellt beziehungsweise erbracht werden sollen, in einem für das Kommunikationsmedium und die Waren, digitalen Inhalte oder verbundenen Dienstleistungen angemessenen Umfang,

   (b) den Gesamtpreis und zusätzliche Kosten nach Artikel 14,

   (c) die Identität und Anschrift des Unternehmers nach Artikel 15,

   (d) die Vertragsbestimmungen nach Artikel 16,

   (e) die Widerrufsrechte nach Artikel 17,

   (f) gegebenenfalls, ob und unter welchen Bedingungen der Unternehmer Kundendienstleistungen, gewerbliche Garantien und Verfahren für den Umgang mit Beschwerden anbietet,

   (g) gegebenenfalls die Möglichkeit des Zugangs zu einem System alternativer Streitbeilegung, dem der Unternehmer unterworfen ist, und die Voraussetzungen für diesen Zugang,

   (h) gegebenenfalls die Funktionen digitaler Inhalte, einschließlich der anwendbaren technischen Schutzmaßnahmen, und

   (i) gegebenenfalls die Interoperabilität digitaler Inhalte mit Hard- und Software, soweit sie dem Unternehmer bekannt ist oder bekannt sein müsste.

2. Die erteilten Informationen mit Ausnahme der nach Absatz 1 Buchstabe c vorgeschriebenen Anschriften sind Bestandteil des Vertrags und dürfen nicht geändert werden, es sei denn, die Vertragsparteien vereinbaren ausdrücklich etwas anderes.

3. Bei einem Fernabsatzvertrag müssen die nach diesem Artikel vorgeschriebenen Informationen

(a) dem Verbraucher in einer dem verwendeten Fernkommunikationsmittel angepassten Weise erteilt oder zur Verfügung gestellt werden,

(b) in klarer und verständlicher Sprache abgefasst sein und

(c) soweit sie auf einem dauerhaften Datenträger bereitgestellt werden, lesbar sein.

4. Bei einem außerhalb von Geschäftsräumen geschlossenen Vertrag müssen die nach diesem Artikel vorgeschriebenen Informationen

(a) auf Papier oder, sofern der Verbraucher zustimmt, auf einem anderen dauerhaften Datenträger zur Verfügung gestellt werden und

(b) lesbar und in klarer und verständlicher Sprache abgefasst sein.

5. Dieser Artikel gilt nicht, wenn der Vertrag

(a) die Lieferung von Lebensmitteln, Getränken oder sonstigen Haushaltswaren des täglichen Bedarfs betrifft, die von einem Unternehmer im Rahmen häufiger und regelmäßiger Fahrten zur Wohnung, an den Aufenthaltsort oder an den Arbeitsplatz des Verbrauchers geliefert werden;

(b) unter Verwendung von Warenautomaten oder automatisierten Geschäftsräumen geschlossen wird;

(c) außerhalb von Geschäftsräumen geschlossen wird und der Preis – oder bei gleichzeitigem Abschluss mehrerer Verträge der Gesamtpreis der Verträge – 50 EUR oder den entsprechenden Betrag in der für den Vertragspreis vereinbarten Währung nicht übersteigt.

Artikel 14
Information über den Preis und zusätzliche Kosten

1. Die Informationen, die nach Artikel 13 Absatz 1 Buchstabe b zu erteilen sind, müssen sich erstrecken auf

(a) den Gesamtpreis der Waren, digitalen Inhalte oder verbundenen Dienstleistungen einschließlich aller Steuern und sonstigen Abgaben oder in Fällen, in denen der Preis aufgrund der Art der Waren, digitalen Inhalte oder verbundenen Dienstleistungen vernünftigerweise nicht im Voraus berechnet werden kann, die Art der Preisberechnung und

(b) gegebenenfalls alle zusätzlichen Fracht-, Liefer- oder Zustellkosten und sonstigen Kosten oder in Fällen, in denen diese Kosten vernünftigerweise nicht im Voraus berechnet werden können, den Hinweis, dass solche zusätzlichen Kosten anfallen können.

2. Bei unbefristeten Verträgen oder Verträgen, die ein Abonnement enthalten, muss der Gesamtpreis den Gesamtpreis pro Abrechnungszeitraum enthalten. Werden bei solchen Verträgen Festbeträge in Rechnung gestellt, so muss der Gesamtpreis den monatlichen Gesamtpreis enthalten. Kann der Gesamtpreis vernünftigerweise nicht im Voraus berechnet werden, so ist die Art der Preisberechnung anzugeben.

3. Gegebenenfalls hat der Unternehmer den Verbraucher über die Kosten für den Einsatz des für den Vertragsschluss verwendeten Fernkommunikationsmittels zu informieren, sofern diese Kosten nicht nach dem Grundtarif berechnet werden.

Artikel 15

Information über die Identität und Anschrift des Unternehmers

Die Informationen, die nach Artikel 13 Absatz 1 Buchstabe c zu erteilen sind, müssen sich erstrecken auf

a) die Identität des Unternehmers, wie etwa seinen Handelsnamen,

b) die Anschrift des Ortes, an dem der Unternehmer niedergelassen ist,

c) gegebenenfalls die Telefonnummer, Faxnummer und E-Mail-Adresse des Unternehmers, damit der Verbraucher schnell Kontakt zu dem Unternehmer aufnehmen und effizient mit ihm kommunizieren kann,

d) gegebenenfalls die Identität und Anschrift eines anderen Unternehmers, in dessen Namen der Unternehmer handelt, und

e) falls diese Anschrift von der nach den Buchstaben b und d angegebenen abweicht, die Anschrift des Unternehmers und gegebenenfalls die Anschrift des Unternehmers, in dessen Namen er handelt, an die sich der Verbraucher mit Beschwerden wenden kann.

Artikel 16

Information über die Vertragsbestimmungen

Die Informationen, die nach Artikel 13 Absatz 1 Buchstabe d zu erteilen sind, müssen sich erstrecken auf

a) die Zahlungsbedingungen, die Lieferung der Waren, die Bereitstellung der digitalen Inhalte oder die Erbringung der verbundenen Dienstleistungen und den Termin, bis zu dem der Unternehmer die Waren liefern, die digitalen Inhalte bereitstellen beziehungsweise die verbundenen Dienstleistungen erbringen muss,

b) gegebenenfalls die Laufzeit des Vertrags, die Mindestdauer der Verpflichtungen des Verbrauchers oder im Falle unbefristeter Verträge oder automatisch verlängerter Verträge die Bedingungen für die Beendigung des Vertrags,

c) gegebenenfalls den Hinweis, dass der Unternehmer vom Verbraucher die Stellung einer Kaution oder die Leistung anderer finanzieller Sicherheiten verlangen kann, sowie deren Bedingungen,

d) gegebenenfalls das Bestehen einschlägiger Verhaltenskodizes und darauf, wo Kopien davon erhältlich sind.

Artikel 17
Information über Widerrufsrechte beim Abschluss von Verträgen im Fernabsatz oder außerhalb von Geschäftsräumen

1. Steht dem Verbraucher nach Kapitel 4 ein Widerrufsrecht zu, so müssen sich die Informationen, die nach Artikel 13 Absatz 1 Buchstabe e zu erteilen sind, auf die Bedingungen, Fristen und Verfahren für die Ausübung dieses Rechts nach Anlage 1 sowie auf das Muster-Widerrufsformular nach Anlage 2 erstrecken.

2. Gegebenenfalls müssen sich die Informationen, die nach Artikel 13 Absatz 1 Buchstabe e zu erteilen sind, auf den Hinweis erstrecken, dass der Verbraucher im Widerrufsfall die Kosten für die Rücksendung der Waren zu tragen hat, und bei Fernabsatzverträgen auf den Hinweis, dass der Verbraucher im Widerrufsfall die Kosten für die Rücksendung der Waren zu tragen hat, wenn die Waren ihrem Wesen nach nicht normal mit der Post zurückgesandt werden können.

3. Kann der Verbraucher das Widerrufsrecht ausüben, nachdem er beantragt hat, dass noch während der Widerrufsfrist mit der Erbringung verbundener Dienstleistungen begonnen wird, so müssen sich die Informationen, die nach Artikel 13 Absatz 1 Buchstabe e zu erteilen sind, auf den Hinweis erstrecken, dass der Verbraucher in diesem Fall dem Unternehmer den in Artikel 45 Absatz 5 genannten Betrag zu zahlen hat.

4. Die Informationspflicht nach den Absätzen 1, 2 und 3 kann der Unternehmer dadurch erfüllen, dass er dem Verbraucher die Muster-Widerrufsbelehrung nach Anlage 1 zur Verfügung stellt. Die Informationspflicht des Unternehmers gilt als erfüllt, wenn er dem Verbraucher diese Belehrung ordnungsgemäß ausgefüllt zur Verfügung gestellt hat.

5. Ist nach Artikel 40 Absatz 2 Buchstaben c bis i und Absatz 3 ein Widerrufsrecht nicht vorgesehen, so müssen die Informationen, die nach Artikel 13 Absatz 1 Buchstabe e zu erteilen sind, eine Erklärung des Inhalts umfassen, dass dem Verbraucher kein Widerrufsrecht zusteht, oder gegebenenfalls, unter welchen Umständen der Verbraucher das Widerrufsrecht verliert.

Artikel 18
Außerhalb von Geschäftsräumen geschlossene Verträge – zusätzliche Informationserfordernisse und Bestätigung

1. Der Unternehmer hat dem Verbraucher eine Kopie des unterzeichneten Vertrags oder die Bestätigung des Vertrags, gegebenenfalls einschließlich der Bestätigung, dass der Verbraucher den Bestimmungen des Artikels 40 Absatz 3 Buchstabe d zugestimmt und sie zur Kenntnis genommen hat, auf Papier oder, sofern der Verbraucher zustimmt, auf einem anderen dauerhaften Datenträger zur Verfügung zu stellen.

2. Wünscht der Verbraucher, dass noch während der Widerrufsfrist nach Artikel 42 Absatz 2 mit der Erbringung verbundener Dienstleistungen begonnen wird, so muss

der Unternehmer verlangen, dass der Verbraucher ausdrücklich einen entsprechenden Antrag auf einem dauerhaften Datenträger stellt.

Artikel 19

Fernabsatzverträge – zusätzliche Informations- und sonstige Erfordernisse

1. Ruft ein Unternehmer einen Verbraucher im Hinblick auf den Abschluss eines Fernabsatzvertrags an, so hat er zu Beginn des Gesprächs mit dem Verbraucher seine Identität und gegebenenfalls die Identität der Person, in deren Namen er anruft, sowie den kommerziellen Zweck des Anrufs offenzulegen.

2. Wird der Fernabsatzvertrag durch ein Fernkommunikationsmittel geschlossen, bei dem für die Darstellung der Informationen nur begrenzter Raum beziehungsweise begrenzte Zeit zur Verfügung steht, so hat der Unternehmer über das jeweilige Fernkommunikationsmittel vor Abschluss des Vertrags zumindest die in Absatz 3 genannten Informationen zu erteilen. Die übrigen in Artikel 13 genannten Informationen hat der Unternehmer dem Verbraucher in geeigneter Weise im Einklang mit Artikel 13 Absatz 3 zu erteilen.

3. Bei den nach Absatz 2 vorgeschriebenen Informationen handelt es sich um

   (a) die wesentlichen Merkmale der Waren, digitalen Inhalte oder verbundenen Dienstleistungen nach Artikel 13 Absatz 1 Buchstabe a,

   (b) die Identität des Unternehmers nach Artikel 15 Buchstabe a,

   (c) den Gesamtpreis einschließlich aller in Artikel 13 Absatz 1 Buchstabe b und Artikel 14 Absätze 1 und 2 genannten Kostenelemente,

   (d) das Widerrufsrecht und

   (e) gegebenenfalls die Laufzeit des Vertrags oder im Falle unbefristeter Verträge die in Artikel 16 Buchstabe b genannten Bedingungen für die Beendigung des Vertrags.

4. Ein telefonisch geschlossener Fernabsatzvertrag ist nur gültig, wenn der Verbraucher das Angebot unterzeichnet oder seine schriftliche Zustimmung übermittelt hat, aus der sein Einverständnis mit dem Abschluss eines Vertrags hervorgeht. Der Unternehmer hat dem Verbraucher eine Bestätigung dieser Einverständniserklärung auf einem dauerhaften Datenträger zur Verfügung zu stellen.

5. Der Unternehmer hat dem Verbraucher eine Bestätigung des geschlossenen Vertrags, gegebenenfalls einschließlich der Bestätigung, dass der Verbraucher den Bestimmungen des Artikels 40 Absatz 3 Buchstabe d zugestimmt und sie zur Kenntnis genommen hat, sowie sämtliche in Artikel 13 genannten Informationen auf einem dauerhaften Datenträger zur Verfügung zu stellen. Der Unternehmer hat diese Informationen innerhalb einer angemessenen Frist nach Abschluss des Fernabsatzvertrags, spätestens aber bei Lieferung der Waren oder vor Beginn der Bereitstellung der digitalen Inhalte oder der Erbringung der verbundenen Dienstleistung zur Verfügung zu stellen, es sei denn, der Verbraucher hat die

Informationen bereits vor Abschluss des Fernabsatzvertrags auf einem dauerhaften Datenträger erhalten.

6. Wünscht der Verbraucher, dass noch während der Widerrufsfrist nach Artikel 42 Absatz 2 mit der Erbringung verbundener Dienstleistungen begonnen wird, so muss der Unternehmer verlangen, dass der Verbraucher ausdrücklich einen entsprechenden Antrag auf einem dauerhaften Datenträger stellt.

Artikel 20
Informationspflicht beim Abschluss von anderen als im Fernabsatz und außerhalb von Geschäftsräumen geschlossenen Verträgen

1. Bei anderen als im Fernabsatz und außerhalb von Geschäftsräumen geschlossenen Verträgen hat ein Unternehmer die Pflicht, den Verbraucher in klarer und verständlicher Form über Folgendes zu informieren, bevor der Vertrag geschlossen beziehungsweise bevor der Verbraucher an ein Angebot gebunden ist, sofern sich diese Informationen nicht bereits aus den Umständen ergeben:

   (a) die wesentlichen Merkmale der Waren, digitalen Inhalte oder verbundenen Dienstleistungen, die geliefert, bereitgestellt beziehungsweise erbracht werden sollen, in einem für das Kommunikationsmedium und die Waren, digitalen Inhalte oder verbundenen Dienstleistungen angemessenen Umfang,

   (b) den Gesamtpreis und zusätzliche Kosten nach Artikel 14 Absatz 1,

   (c) die Identität des Unternehmers, wie etwa seinen Handelsnamen, die Anschrift des Ortes, an dem er niedergelassen ist, und seine Telefonnummer,

   (d) die Vertragsbestimmungen nach Artikel 16 Buchstaben a und b,

   (e) gegebenenfalls, ob und unter welchen Bedingungen der Unternehmer Kundendienstleistungen, gewerbliche Garantien und Verfahren für den Umgang mit Beschwerden anbietet,

   (f) gegebenenfalls die Funktionen digitaler Inhalte, einschließlich der anwendbaren technischen Schutzmaßnahmen und

   (g) gegebenenfalls die Interoperabilität digitaler Inhalte mit Hard- und Software, soweit sie dem Unternehmer bekannt ist oder bekannt sein müsste.

2. Dieser Artikel gilt nicht, wenn der Vertrag ein Alltagsgeschäft betrifft und zum Zeitpunkt des Vertragsschlusses sofort erfüllt wird.

Artikel 21
Beweislast

Der Unternehmer trägt die Beweislast dafür, dass er die nach diesem Abschnitt vorgeschriebenen Informationen erteilt hat.

Artikel 22
Zwingender Charakter

Die Parteien dürfen die Anwendung dieses Abschnittes nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

ABSCHNITT 2 VORVERTRAGLICHE INFORMATIONSPFLICHTEN IM VERHÄLTNIS ZWISCHEN UNTERNEHMERN

Artikel 23
Offenlegungspflicht in Bezug auf Waren und verbundene Dienstleistungen

1. Vor Abschluss eines Vertrags zwischen Unternehmern über den Kauf von Waren, die Bereitstellung digitaler Inhalte oder die Erbringung verbundener Dienstleistungen ist der Verkäufer, Lieferant beziehungsweise Erbringer verpflichtet, dem anderen Unternehmer gegenüber auf jede nach den Umständen geeignete Weise alle Informationen in Bezug auf die wesentlichen Merkmale der zu liefernden Waren, der bereitzustellenden digitalen Inhalte beziehungsweise der zu erbringenden verbundenen Dienstleistungen offen zu legen, über die er verfügt oder verfügen müsste und deren Nichtoffenlegung gegenüber der anderen Partei gegen das Gebot von Treu und Glauben und den Grundsatz des redlichen Geschäftsverkehrs verstoßen würde.

2. Bei der Prüfung, ob Absatz 1 verlangt, dass der Verkäufer, Lieferant beziehungsweise Erbringer bestimmte Informationen offen legt, sind sämtliche Umstände zu berücksichtigen, insbesondere,

   (a) ob der Verkäufer, Lieferant beziehungsweise Erbringer über besondere Sachkunde verfügte,

   (b) die Aufwendungen des Verkäufers, Lieferanten beziehungsweise Erbringers für die Erlangung der einschlägigen Informationen,

   (c) ob der andere Unternehmer die Informationen leicht auf andere Weise hätte erlangen können,

   (d) die Art der Informationen,

   (e) die wahrscheinliche Bedeutung der Informationen für den anderen Unternehmer und

   (f) die gute Handelspraxis in der betreffenden Situation.

ABSCHNITT 3 ABSCHLUSS VON VERTRÄGEN AUF ELEKTRONISCHEM WEGE

Artikel 24
Zusätzliche Informationspflichten beim Abschluss von Fernabsatzverträgen auf elektronischem Wege

1. Dieser Artikel gilt, wenn ein Unternehmer die Mittel für den Abschluss eines Vertrags zur Verfügung stellt und wenn diese Mittel elektronische Mittel sind und keinen exklusiven Austausch von E-Mails oder sonstigen individuellen elektronischen Nachrichten mit sich bringen.

2. Der Unternehmer hat der anderen Partei geeignete, effektive und zugängliche technische Mittel zur Verfügung zu stellen, mit denen sie vor der Abgabe oder Annahme eines Angebots Eingabefehler erkennen und korrigieren kann.

3. Der Unternehmer hat die andere Partei über Folgendes zu informieren, bevor sie ein Angebot abgibt oder annimmt:

   (a) welche technischen Schritte befolgt werden müssen, um den Vertrag zu schließen;

   (b) ob der geschlossene Vertrag vom Unternehmer gespeichert und ob er zugänglich sein wird;

   (c) die technischen Mittel zur Erkennung und Korrektur von Eingabefehlern, bevor die andere Partei ein Angebot abgibt oder annimmt;

   (d) die für den Vertragsschluss zur Verfügung stehenden Sprachen;

   (e) die Vertragsbestimmungen.

4. Der Unternehmer hat sicherzustellen, dass die in Absatz 3 Buchstabe e genannten Vertragsbestimmungen in Buchstaben oder anderen verständlichen Zeichen auf einem dauerhaften Datenträger in einer Form zur Verfügung gestellt werden, die das Lesen und Aufnehmen der im Text enthaltenen Informationen sowie deren Wiedergabe in materieller Form ermöglicht.

5. Der Unternehmer hat den Empfang eines Angebots der anderen Partei oder einer Annahme durch die andere Partei unverzüglich auf elektronischem Wege zu bestätigen.

Artikel 25
Zusätzliche Erfordernisse beim Abschluss von Fernabsatzverträgen auf elektronischem Wege

1. Würde ein auf elektronischem Wege geschlossener Fernabsatzvertrag den Verbraucher zu einer Zahlung verpflichten, so hat der Unternehmer den Verbraucher, unmittelbar bevor dieser seine Bestellung tätigt, klar und deutlich auf die nach

Artikel 13 Absatz 1 Buchstabe a, Artikel 14 Absätze 1 und 2 sowie Artikel 16 Buchstabe b vorgeschriebenen Informationen hinzuweisen.

2. Der Unternehmer hat dafür zu sorgen, dass der Verbraucher bei der Bestellung ausdrücklich anerkennt, dass die Bestellung mit einer Zahlungspflicht verbunden ist. Umfasst der Bestellvorgang die Aktivierung einer Schaltfläche oder eine ähnliche Funktion, so ist diese Schaltfläche oder ähnliche Funktion gut leserlich ausschließlich mit den Worten „Bestellung mit Zahlungspflicht“ oder einer ähnlichen eindeutigen Formulierung zu kennzeichnen, die den Verbraucher darauf hinweist, dass die Bestellung mit einer Zahlungspflicht gegenüber dem Unternehmer verbunden ist. Hält sich der Unternehmer nicht an diesen Absatz, so ist der Verbraucher nicht durch den Vertrag oder die Bestellung gebunden.

3. Der Unternehmer hat auf seiner Website für den elektronischen Geschäftsverkehr spätestens bei Beginn des Bestellvorgangs klar und deutlich anzugeben, ob Lieferbeschränkungen bestehen und welche Zahlungsmittel akzeptiert werden.

Artikel 26
Beweislast

Im Verhältnis zwischen einem Unternehmer und einem Verbraucher trägt der Unternehmer die Beweislast dafür, dass er die nach diesem Abschnitt vorgeschriebenen Informationen erteilt hat.

Artikel 27
Zwingender Charakter

Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Geltung dieses Abschnitts nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

ABSCHNITT 4 PFLICHT ZUR SICHERSTELLUNG DER RICHTIGKEIT VON INFORMATIONEN

Artikel 28
Pflicht zur Sicherstellung der Richtigkeit von Informationen

1. Eine Partei, die zur Erfüllung der sich aus diesem Kapitel ergebenden Pflichten oder aus anderen Gründen vor oder bei Vertragsschluss Informationen erteilt, hat in angemessener Weise dafür Sorge zu tragen, dass die erteilten Informationen richtig und nicht irreführend sind.

2. Einer Partei, die infolge einer Verletzung der in Absatz 1 genannten Pflicht durch die andere Partei unrichtige oder irreführende Informationen erhalten hat und vernünftigerweise beim Vertragsschluss mit dieser Partei darauf vertraut, stehen die Abhilfen des Artikels 29 zu.

3. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

ABSCHNITT 5 ABHILFEN BEI VERLETZUNG VON INFORMATIONSPFLICHTEN

Artikel 29
Abhilfen bei Verletzung von Informationspflichten

1. Eine Partei, die eine sich aus diesem Kapitel ergebende Pflicht nicht erfüllt, haftet für jeden Verlust, der der anderen Partei durch diese Pflichtverletzung entsteht.

2. Hat der Unternehmer seine Pflicht zur Information über zusätzliche oder sonstige Kosten nach Artikel 14 oder die Kosten für die Rücksendung der Waren nach Artikel 17 Absatz 2 nicht erfüllt, so ist der Verbraucher nicht verpflichtet, die zusätzlichen oder sonstigen Kosten zu zahlen.

3. Die Abhilfen nach diesem Artikel gelten unbeschadet der Abhilfen nach Artikel 42 Absatz 2, Artikel 48 oder Artikel 49.

4. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Kapitel 3 Vertragsschluss

Artikel 30
Erfordernisse für den Abschluss eines Vertrags

1. Ein Vertrag ist geschlossen, wenn

   (a) die Parteien eine Einigung erzielen,

   (b) sie ihrer Einigung Rechtswirkung verleihen wollen und

   (c) diese Einigung, gegebenenfalls ergänzt durch die Vorschriften des Gemeinsamen Europäischen Kaufrechts, einen ausreichenden Inhalt hat und hinreichend bestimmt ist, so dass davon Rechtswirkungen ausgehen können.

2. Eine Einigung wird durch Annahme eines Angebots erzielt. Die Annahme kann ausdrücklich oder durch andere Erklärungen oder Verhalten erfolgen.

3. Ob die Parteien ihrer Einigung Rechtswirkung verleihen wollen, ist ihren Erklärungen und ihrem Verhalten zu entnehmen.

4. Macht eine der Parteien den Abschluss eines Vertrags von einer Einigung über einen bestimmten Punkt abhängig, so kommt der Vertrag nur zustande, wenn eine Einigung über diesen Punkt erzielt wird.

Artikel 31
Angebot

1. Ein Vorschlag stellt ein Angebot dar, wenn

   (a) er in der Absicht unterbreitet wird, im Falle seiner Annahme zu einem Vertrag zu führen, und

   (b) er einen ausreichenden Inhalt hat und hinreichend bestimmt ist, so dass ein Vertrag geschlossen werden kann.

2. Ein Angebot kann gegenüber einer oder mehreren bestimmten Personen abgegeben werden.

3. Ein an die Allgemeinheit gerichteter Vorschlag stellt kein Angebot dar, es sei denn, aus den Umständen ergibt sich etwas anderes.

Artikel 32
Rücknahme des Angebots

1. Ein Angebot kann zurückgenommen werden, wenn die Rücknahmeerklärung dem Empfänger zugeht, bevor er seine Annahme erklärt hat oder, im Falle der Annahme durch Verhalten, bevor der Vertrag geschlossen worden ist.

2. Stellt ein an die Allgemeinheit gerichteter Vorschlag ein Angebot dar, so kann dieses auf dieselbe Weise zurückgenommen werden, wie es abgegeben wurde.

3. Die Rücknahme eines Angebots ist unwirksam, wenn

   (a) das Angebot zum Ausdruck bringt, dass es unwiderruflich ist,

   (b) das Angebot eine feste Frist für die Annahme bestimmt oder

   (c) der Empfänger aus sonstigen Gründen vernünftigerweise auf die Unwiderruflichkeit des Angebots vertrauen konnte und er im Vertrauen auf das Angebot gehandelt hat.

Artikel 33
Ablehnung des Angebots

Das Angebot erlischt, sobald die Ablehnung des Angebots dem Anbietenden zugeht.

Artikel 34
Annahme

1. Jede Form von Erklärung oder Verhalten des Empfängers stellt eine Annahme dar, wenn damit eine Zustimmung zu dem Angebot ausgedrückt wird.

2. Schweigen oder Untätigkeit stellen allein keine Annahme dar.

Artikel 35
Zeitpunkt des Vertragsschlusses

1. Hat der Empfänger die Annahme des Angebots erklärt, so ist der Vertrag geschlossen, sobald die Annahmeerklärung dem Anbietenden zugeht.

2. Wird das Angebot durch Verhalten angenommen, so ist der Vertrag geschlossen, sobald der Anbietende Kenntnis von dem Verhalten erlangt.

3. Kann der Empfänger aufgrund des Angebots, von zwischen den Parteien entstandenen Gepflogenheiten oder von Gebräuchen das Angebot durch Verhalten ohne Mitteilung an den Anbietenden annehmen, so ist der Vertrag ungeachtet des Absatzes 2 geschlossen, sobald der Empfänger zu handeln beginnt.

Artikel 36
Annahmefrist

1. Die Annahme des Angebots ist nur wirksam, wenn sie dem Anbietenden innerhalb der von ihm im Angebot gesetzten Frist zugeht.

2. Hat der Anbietende keine Frist gesetzt, so ist die Annahme nur wirksam, wenn sie ihm innerhalb einer angemessenen Frist nach der Abgabe des Angebots zugeht.

3. Kann das Angebot durch Vornahme einer Handlung ohne Mitteilung an den Anbietenden angenommen werden, so ist die Annahme nur wirksam, wenn die Handlung innerhalb der vom Anbietenden gesetzten Annahmefrist oder, wenn eine solche Frist nicht gesetzt worden ist, innerhalb einer angemessenen Frist vorgenommen wird.

Artikel 37
Verspätete Annahme

1. Eine verspätete Annahme ist wirksam, wenn der Anbietende den Empfänger unverzüglich davon unterrichtet, dass er sie als wirksame Annahme behandelt.

2. Ergibt sich aus einem Schreiben oder einer anderen eine verspätete Annahme enthaltenden Nachricht, dass sie nach den Umständen, unter denen sie abgesandt wurde, bei normaler Übermittlung dem Anbietenden rechtzeitig zugegangen wäre, so ist die verspätete Annahme wirksam, es sei denn, der Anbietende unterrichtet den Empfänger unverzüglich davon, dass er das Angebot als erloschen betrachtet.

Artikel 38
Geänderte Annahme

1. Eine Antwort des Empfängers, die ausdrücklich oder stillschweigend zusätzliche oder abweichende Vertragsbestimmungen enthält, die die Bestimmungen des Angebots erheblich ändern würden, stellt eine Ablehnung und ein neues Angebot dar.

2. Bei zusätzlichen oder abweichenden Vertragsbestimmungen, die sich unter anderem auf den Preis, die Zahlung, die Qualität und Quantität der Waren, den Ort und die Zeit der Lieferung, den Umfang der Haftung einer Partei gegenüber der anderen oder auf die Beilegung von Streitigkeiten beziehen, wird vermutet, dass sie die Bestimmungen des Angebots erheblich ändern.

3. Eine Antwort, die eine klare Zustimmung zu dem Angebot enthält, stellt auch dann eine Annahme dar, wenn sie ausdrücklich oder stillschweigend zusätzliche oder abweichende Vertragsbestimmungen enthält, sofern diese die Bestimmungen des Angebots nicht erheblich ändern. Die zusätzlichen oder abweichenden Bestimmungen werden dann Teil des Vertrags.

4. Eine Antwort, die ausdrücklich oder stillschweigend zusätzliche oder abweichende Vertragsbestimmungen enthält, stellt stets eine Ablehnung des Angebots dar, wenn

   (a) das Angebot die Annahme ausdrücklich auf die Bestimmungen des Angebots beschränkt,

   (b) der Anbietende den zusätzlichen oder abweichenden Bestimmungen unverzüglich widerspricht oder

   (c) der Empfänger des Angebots seine Annahme von der Zustimmung des Anbietenden zu den zusätzlichen oder abweichenden Bestimmungen abhängig

macht und die Zustimmung des Anbietenden dem Angebotsempfänger nicht innerhalb einer angemessenen Frist zugeht.

Artikel 39
Widersprechende Standardvertragsbestimmungen

1. Haben die Parteien abgesehen davon, dass sich Angebot und Annahme auf einander widersprechende Standardvertragsbestimmungen beziehen, eine Einigung erzielt, so ist der Vertrag dennoch geschlossen. Die Standardvertragsbestimmungen sind insoweit Teil des Vertrags, als sie sich inhaltlich decken.

2. Unbeschadet des Absatzes 1 ist der Vertrag nicht geschlossen, wenn eine Partei

   (a) im Voraus ausdrücklich und nicht durch Standardvertragsbestimmungen zum Ausdruck gebracht hat, dass sie nicht auf der Grundlage von Absatz 1 durch einen Vertrag gebunden sein will, oder

   (b) die andere Partei unverzüglich davon in Kenntnis setzt, dass sie nicht durch einen solchen Vertrag gebunden sein will.

Kapitel 4 Widerrufsrecht bei im Fernabsatz und außerhalb von Geschäftsräumen geschlossenen Verträgen zwischen Unternehmern und Verbrauchern

Artikel 40
Widerrufsrecht

1. Während der Frist nach Artikel 42 kann der Verbraucher folgende Verträge ohne Angabe von Gründen und – sofern in Artikel 45 nichts anderes bestimmt ist – ohne Kosten für den Verbraucher widerrufen:

   (a) Fernabsatzverträge,

   (b) außerhalb von Geschäftsräumen geschlossene Verträge, sofern der Preis – oder bei gleichzeitigem Abschluss mehrerer Verträge der Gesamtpreis der Verträge – 50 EUR oder den entsprechenden Betrag in der für den Vertragspreis vereinbarten Währung zum Zeitpunkt des Vertragsschlusses übersteigt.

2. Absatz 1 gilt nicht für

   (a) Verträge, die unter Verwendung von Warenautomaten oder automatisierten Geschäftsräumen geschlossen werden,

   (b) Verträge, die die Lieferung von Lebensmitteln, Getränken oder sonstigen Haushaltsgegenständen des täglichen Bedarfs betreffen, die von einem Unternehmer im Rahmen häufiger und regelmäßiger Fahrten zur Wohnung, an den Aufenthaltsort oder an den Arbeitsplatz des Verbrauchers geliefert werden,

   (c) Verträge, die die Lieferung von Waren oder die Erbringung verbundener Dienstleistungen betreffen, deren Preis von Schwankungen auf dem Finanzmarkt abhängt, auf die der Unternehmer keinen Einfluss hat und die innerhalb der Widerrufsfrist auftreten können,

   (d) Verträge, die die Lieferung von Waren oder die Bereitstellung digitaler Inhalte betreffen, die nach Spezifikationen des Verbrauchers angefertigt werden oder eindeutig auf die persönlichen Bedürfnisse zugeschnitten sind,

   (e) Verträge, die die Lieferung von Waren betreffen, die schnell verderben können oder deren Verfallsdatum schnell überschritten würde,

   (f) Verträge, die die Lieferung alkoholischer Getränke betreffen, deren Preis bei Abschluss des Kaufvertrags vereinbart wurde, deren Lieferung aber erst 30 Tage nach Vertragsschluss erfolgen kann und deren tatsächlicher Wert von Schwankungen auf dem Markt abhängt, auf die der Unternehmer keinen Einfluss hat,

   (g) Verträge, die den Kauf einer Zeitung, Zeitschrift oder Illustrierten betreffen, mit Ausnahme von Abonnement-Verträgen über die Lieferung solcher Veröffentlichungen,

(h) Verträge, die auf einer öffentlichen Versteigerung geschlossen werden, und

(i) Verträge, die im Zusammenhang mit Freizeitbetätigungen die Lieferung von Speisen und Getränken oder Dienstleistungen betreffen und für die Erfüllung einen spezifischen Termin oder Zeitraum vorsehen.

3. Absatz 1 gilt nicht in folgenden Fällen:

(a) wenn die gelieferten Waren versiegelt waren, die Versiegelung vom Verbraucher entfernt wurde und die Waren dann aus Gründen des Gesundheitsschutzes oder der Hygiene nicht mehr zur Rückgabe geeignet sind;

(b) wenn die Waren nach der Lieferung ihrem Wesen nach untrennbar mit anderen Gütern vermischt wurden;

(c) wenn es sich bei den gelieferten Waren um Ton- oder Videoaufnahmen oder Computersoftware in einer versiegelten Packung gehandelt hat, die nach der Lieferung entfernt wurde;

(d) wenn die Bereitstellung digitaler Inhalte, die nicht auf einen materiellen Datenträger bereitgestellt werden, bereits begonnen und der Verbraucher dieser Bereitstellung zuvor ausdrücklich zugestimmt und zur Kenntnis genommen hat, dass er hierdurch das Widerrufsrecht verliert;

(e) wenn der Verbraucher den Unternehmer ausdrücklich um einen Besuch gebeten hat, um dringende Reparatur- oder Instandhaltungsarbeiten vorzunehmen. Erbringt der Unternehmer bei einem solchen Besuch weitere verbundene Dienstleistungen, die der Verbraucher nicht ausdrücklich verlangt hat, oder liefert er Waren, die bei der Instandhaltung oder Reparatur nicht unbedingt als Ersatzteile benötigt werden, so steht dem Verbraucher in Bezug auf diese zusätzlichen verbundenen Dienstleistungen oder Waren ein Widerrufsrecht zu.

4. Hat der Verbraucher ein Angebot abgegeben, das im Falle seiner Annahme zum Abschluss eines Vertrags führen würde, der nach diesem Kapitel widerrufen werden könnte, so kann der Verbraucher das Angebot auch dann widerrufen, wenn es ansonsten unwiderruflich wäre.

Artikel 41
Ausübung des Widerrufsrechts

1. Der Verbraucher kann das Widerrufsrecht jederzeit vor Ablauf der in Artikel 42 vorgesehenen Widerrufsfrist ausüben.

2. Der Verbraucher übt das Widerrufsrecht durch Mitteilung an den Unternehmer aus. Der Verbraucher kann zu diesem Zweck entweder das Muster-Widerrufsformular nach Anlage 2 verwenden oder seinen Entschluss, den Vertrag zu widerrufen, mit einer entsprechenden eindeutigen Erklärung in beliebiger anderer Form darlegen.

3. Gibt der Unternehmer dem Verbraucher die Möglichkeit, den Vertrag auf seiner Website für den elektronischen Geschäftsverkehr elektronisch zu widerrufen, und

macht der Verbraucher von dieser Möglichkeit Gebrauch, so hat der Unternehmer die Pflicht, dem Verbraucher unverzüglich eine Bestätigung über den Eingang seines Widerrufs auf einem dauerhaften Datenträger zu übermitteln. Der Unternehmer haftet für jeden Verlust, der der anderen Partei durch eine Verletzung dieser Pflicht entsteht.

4. Der Widerruf ist rechtzeitig mitgeteilt, wenn die Mitteilung vor Ablauf der Widerrufsfrist abgeschickt wird.

5. Der Verbraucher trägt die Beweislast dafür, dass er das Widerrufsrecht im Einklang mit diesem Artikel ausgeübt hat.

Artikel 42
Widerrufsfrist

1. Die Widerrufsfrist endet vierzehn Tage nach

   (a) dem Tag, an dem der Verbraucher die Waren in Empfang genommen hat, im Falle von Kaufverträgen, einschließlich Kaufverträgen, in denen sich der Verkäufer auch zur Erbringung verbundener Dienstleistungen bereit erklärt;

   (b) dem Tag, an dem der Verbraucher die letzte Ware in Empfang genommen hat, im Falle von Verträgen über den Kauf mehrerer Waren, die der Verbraucher gleichzeitig bestellt hat und die getrennt geliefert werden, einschließlich Verträgen, in denen sich der Verkäufer auch zur Erbringung verbundener Dienstleistungen bereit erklärt;

   (c) dem Tag, an dem der Verbraucher die letzte Teilsendung oder das letzte Stück in Empfang genommen hat, im Falle von Verträgen, nach denen Waren in mehreren Teilsendungen oder Stücken geliefert werden, einschließlich Verträgen, in denen sich der Verkäufer auch zur Erbringung verbundener Dienstleistungen bereit erklärt;

   (d) dem Tag, an dem der Verbraucher die erste Ware in Empfang genommen hat, im Falle von Verträgen über die regelmäßige Lieferung von Waren über einen bestimmten Zeitraum hinweg, einschließlich Verträgen, in denen sich der Verkäufer auch zur Erbringung verbundener Dienstleistungen bereit erklärt;

   (e) dem Tag des Vertragsschlusses im Falle von Verträgen über verbundene Dienstleistungen, die nach Lieferung der Waren geschlossen werden;

   (f) dem Tag, an dem der Verbraucher den materiellen Datenträger nach Buchstabe a in Empfang genommen hat, im Falle von Verträgen, nach denen digitale Inhalte auf einem materiellen Datenträger bereitgestellt werden;

   (g) dem Tag des Vertragsschlusses im Falle von Verträgen, nach denen digitale Inhalte nicht auf einem materiellen Datenträger bereitgestellt werden.

2. Hat der Unternehmer dem Verbraucher nicht die in Artikel 17 Absatz 1 genannten Informationen erteilt, so endet die Widerrufsfrist

   (a) ein Jahr nach Ablauf der ursprünglichen Widerrufsfrist nach Absatz 1 oder

   (b) wenn der Unternehmer dem Verbraucher die vorgeschriebenen Informationen innerhalb eines Jahres nach Ablauf der Widerrufsfrist nach Absatz 1 erteilt, vierzehn Tage nach dem Tag, an dem der Verbraucher die Informationen erhalten hat.

Artikel 43
Wirkungen des Widerrufs

Mit dem Widerruf endet die Verpflichtung beider Parteien,

a) den Vertrag zu erfüllen oder

b) in Fällen, in denen der Verbraucher ein Angebot abgegeben hat, den Vertrag zu schließen.

Artikel 44
Verpflichtungen des Unternehmers im Widerrufsfall

1. Der Unternehmer hat alle Zahlungen, die er vom Verbraucher erhalten hat, gegebenenfalls einschließlich der Lieferkosten, unverzüglich, spätestens aber innerhalb von vierzehn Tagen nach dem Tag zu erstatten, an dem er nach Artikel 41 über den Entschluss des Verbrauchers, den Vertrag zu widerrufen, informiert worden ist. Der Unternehmer hat diese Rückzahlung unter Verwendung desselben Zahlungsmittels vorzunehmen, das vom Verbraucher bei der ursprünglichen Transaktion verwendet wurde, es sei denn, mit dem Verbraucher wurde ausdrücklich etwas anderes vereinbart, und vorausgesetzt, für den Verbraucher fallen infolge einer solchen Rückzahlung keine Gebühren an.

2. Ungeachtet des Absatzes 1 ist der Unternehmer nicht verpflichtet, die zusätzlichen Kosten zu erstatten, wenn sich der Verbraucher ausdrücklich für eine andere Art der Lieferung als die vom Unternehmer angebotene günstigste Standardlieferung entschieden hat.

3. Im Falle von Verträgen über den Kauf von Waren kann der Unternehmer die Rückzahlung verweigern, bis er die Waren wieder in Empfang genommen hat oder der Verbraucher den Nachweis ihrer Rücksendung erbracht hat, je nachdem, welches Ereignis früher eintritt, es sei denn, der Unternehmer hat angeboten, die Waren abzuholen.

4. Im Falle von außerhalb von Geschäftsräumen geschlossenen Verträgen, bei denen die Waren zum Zeitpunkt des Vertragsschlusses zur Wohnung des Verbrauchers geliefert worden sind, hat der Unternehmer die Waren auf eigene Kosten abzuholen, wenn die Waren ihrem Wesen nach nicht normal mit der Post zurückgesandt werden können.

Artikel 45
Verpflichtungen des Verbrauchers im Widerrufsfall

1. Der Verbraucher hat die Waren unverzüglich, spätestens aber innerhalb von vierzehn Tagen nach dem Tag, an dem er nach Artikel 41 seinen Entschluss, den Vertrag zu widerrufen, dem Unternehmer mitgeteilt hat, an den Unternehmer oder eine von diesem ermächtigte Person zurückzusenden oder zu übergeben, es sei denn, der Unternehmer hat angeboten, die Waren abzuholen. Die Frist ist eingehalten, wenn der Verbraucher die Waren vor Ablauf der Frist von vierzehn Tagen zurücksendet.

2. Der Verbraucher hat die direkten Kosten der Rücksendung der Waren zu tragen, es sei denn, der Unternehmer hat sich bereit erklärt, diese Kosten zu tragen, oder der Unternehmer hat es versäumt, den Verbraucher darüber zu unterrichten, dass der Verbraucher diese Kosten zu tragen hat.

3. Der Verbraucher haftet für einen etwaigen Wertverlust der Waren nur, wenn dieser Wertverlust auf einen zur Feststellung der Art, Beschaffenheit und Funktionstüchtigkeit der Waren nicht notwendigen Umgang mit ihnen zurückzuführen ist. Der Verbraucher haftet nicht für einen Wertverlust der Waren, wenn der Unternehmer ihm nicht nach Artikel 17 Absatz 1 alle Informationen über das Widerrufsrecht erteilt hat.

4. Unbeschadet des Absatzes 3 ist der Verbraucher nicht zur Zahlung einer Entschädigung für die Nutzung der Waren während der Widerrufsfrist verpflichtet.

5. Übt der Verbraucher das Widerrufsrecht aus, nachdem er ausdrücklich beantragt hat, dass noch während der Widerrufsfrist mit der Erbringung verbundener Dienstleistungen begonnen wird, so hat er dem Unternehmer den Betrag zu zahlen, der bezogen auf das Gesamtauftragsvolumen dem Anteil entspricht, der vor der Ausübung des Widerrufsrechts durch den Verbraucher bereits geleistet wurde. Der Teilbetrag, den der Verbraucher dem Unternehmer zu zahlen hat, ist ausgehend vom vertraglich vereinbarten Gesamtpreis zu berechnen. Ist der Gesamtpreis überhöht, so ist der Teilbetrag ausgehend vom Marktwert der erbrachten Leistung zu berechnen.

6. Der Verbraucher ist nicht verpflichtet, die Kosten zu tragen für

   (a) die Erbringung verbundener Dienstleistungen, die ganz oder teilweise während der Widerrufsfrist erbracht wurden, wenn

   i) der Unternehmer es versäumt hat, die Informationen nach Artikel 17 Absatz 1 und 3 zu erteilen, oder

   ii) der Verbraucher nicht ausdrücklich nach Artikel 18 Absatz 2 beziehungsweise Artikel 19 Absatz 6 beantragt hat, dass noch während der Widerrufsfrist mit der Erbringung begonnen wird;

   (b) die vollständige oder teilweise Bereitstellung digitaler Inhalte, die nicht auf einem materiellen Datenträger bereitgestellt werden, wenn

   i) der Verbraucher nicht zuvor ausdrücklich zugestimmt hat, dass noch vor Ablauf der Widerrufsfrist nach Artikel 42 Absatz 1 mit der Bereitstellung der digitalen Inhalte begonnen wird,

ii) der Verbraucher nicht zur Kenntnis genommen hat, dass er mit der Zustimmung das Widerrufsrecht verliert, oder

iii) der Unternehmer es versäumt hat, die Bestätigung nach Artikel 18 Absatz 1 beziehungsweise Artikel 19 Absatz 5 zur Verfügung zu stellen.

7. Sofern in diesem Artikel nichts anderes bestimmt ist, kann der Verbraucher aufgrund der Ausübung des Widerrufsrechts nicht haftbar gemacht werden.

Artikel 46
Akzessorische Verträge

1. Übt ein Verbraucher das Recht auf Widerruf eines im Fernabsatz oder außerhalb von Geschäftsräumen geschlossenen Vertrags nach den Artikeln 41 bis 45 aus, so werden auch alle akzessorischen Verträge ohne Kosten für den Verbraucher automatisch beendet, sofern in den Absätzen 2 und 3 nichts anderes bestimmt ist. Für die Zwecke dieses Artikels ist ein akzessorischer Vertrag ein Vertrag, mit dem ein Verbraucher Waren, digitale Inhalte oder verbundene Dienstleistungen erwirbt, die im Zusammenhang mit einem im Fernabsatz oder außerhalb von Geschäftsräumen geschlossenen Vertrag stehen, und nach dem diese Waren, digitalen Inhalte oder verbundenen Dienstleistungen von dem Unternehmer oder einem Dritten auf der Grundlage einer Vereinbarung zwischen diesem Dritten und dem Unternehmer geliefert, bereitgestellt beziehungsweise erbracht werden.

2. Die Artikel 43, 44 und 45 gelten entsprechend für akzessorische Verträge, soweit diese Verträge dem Gemeinsamen Europäischen Kaufrecht unterliegen.

3. Bei akzessorischen Verträgen, die nicht dem Gemeinsamen Europäischen Kaufrecht unterliegen, ist für die Verpflichtungen der Parteien im Widerrufsfall das anwendbare Recht maßgebend.

Artikel 47
Zwingender Charakter

Die Parteien dürfen die Anwendung dieses Kapitels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Kapitel 5 Einigungsmängel

Artikel 48
Irrtum

1. Eine Partei kann einen Vertrag wegen eines bei Vertragsschluss vorhandenen Tatsachen- oder Rechtsirrtums anfechten, wenn

   (a) diese Partei, wäre sie dem Irrtum nicht unterlegen, den Vertrag nicht oder nur mit grundlegend anderen Vertragsbestimmungen geschlossen hätte und die andere Partei dies wusste oder wissen musste, und

   (b) die andere Partei

   i) den Irrtum verursacht hat,

   ii) den irrtumsbehafteten Vertragsschluss durch Verletzung vorvertraglicher Informationspflichten nach Kapitel 2 Abschnitte 1 bis 4 verursacht hat,

   iii) von dem Irrtum wusste oder wissen musste und den irrtumsbehafteten Vertragsschluss verursacht hat, indem sie nicht auf die einschlägigen Informationen hingewiesen hat, sofern sie nach dem Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs dazu verpflichtet gewesen wäre, oder

   iv) demselben Irrtum unterlag.

2. Eine Partei kann einen Vertrag nicht wegen Irrtums anfechten, wenn das Risiko des Irrtums von dieser Partei übernommen wurde oder nach den Umständen von ihr getragen werden sollte.

3. Ein Fehler in der Verlautbarung oder Übermittlung einer Erklärung ist als Irrtum der Person anzusehen, die die Erklärung abgegeben oder übersandt hat.

Artikel 49
Arglistige Täuschung

1. Eine Partei kann einen Vertrag anfechten, wenn sie von der anderen Partei durch arglistige Täuschung, sei es durch Worte oder durch Verhalten, zum Vertragsschluss bestimmt worden ist oder durch arglistiges Verschweigen von Informationen, die sie nach dem Gebot von Treu und Glauben und dem Grundsatz des redlichen Geschäftsverkehrs oder aufgrund vorvertraglicher Informationspflichten hätte offen legen müssen.

2. Eine Täuschung ist arglistig, wenn sie in dem Wissen oder der Annahme, dass es sich um die Unwahrheit handelt, oder leichtfertig hinsichtlich Wahrheit oder Unwahrheit begangen wird und sie in der Absicht geschieht, den Empfänger dazu zu

bestimmen, einen Irrtum zu begehen. Ein Verschweigen ist arglistig, wenn es in der Absicht geschieht, die Person, der die Informationen vorenthalten werden, dazu zu bestimmen, einen Irrtum zu begehen.

3. Für die Feststellung, ob das Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs verlangt, dass eine Partei bestimmte Informationen offenbart, sind sämtliche Umstände zu berücksichtigen, insbesondere,

   (a) ob die Partei über besondere Sachkunde verfügte,

   (b) die Aufwendungen der Partei für die Erlangung der einschlägigen Informationen,

   (c) ob die andere Partei die Informationen leicht auf andere Weise hätte erlangen können,

   (d) die Art der Informationen,

   (e) die offenkundige Bedeutung der Informationen für die andere Partei und

   (f) in Verträgen zwischen Unternehmern die gute Handelspraxis unter den gegebenen Umständen.

Artikel 50
Drohung

Eine Partei kann einen Vertrag anfechten, wenn sie von der anderen Partei durch Drohung mit einem rechtswidrigen, unmittelbar bevorstehenden ernsthaften Übel oder mit einer rechtswidrigen Handlung zum Vertragsschluss bestimmt wurde.

Artikel 51
Unfaire Ausnutzung

Eine Partei kann einen Vertrag anfechten, wenn bei Vertragsschluss

a) diese Partei von der anderen Partei abhängig war, zu ihr in einem Vertrauensverhältnis stand, sich in einer wirtschaftlichen Notlage befand, dringende Bedürfnisse hatte oder unvorsichtig, unwissend, oder unerfahren war und

b) die andere Partei davon wusste oder wissen musste und unter Berücksichtigung der Umstände und des Zwecks des Vertrags die Lage der ersten Partei ausgenutzt hat, um sich einen übermäßigen Nutzen oder unfairen Vorteil zu verschaffen.

Artikel 52
Anfechtungsmitteilung

1. Die Anfechtung wird durch Mitteilung an die andere Partei ausgeübt.

2. Eine Anfechtungsmitteilung ist nur wirksam, wenn sie innerhalb von

(a) sechs Monaten im Falle eines Irrtums und

(b) einem Jahr im Falle von arglistiger Täuschung, Drohung und unfairer Ausnutzung

nach dem Zeitpunkt erklärt wird, zu dem die anfechtende Partei Kenntnis von den maßgebenden Umständen erlangt hat oder ab dem sie wieder frei handeln konnte.

Artikel 53
Bestätigung

Bestätigt die Partei, die nach diesem Kapitel das Recht hat, einen Vertrag anzufechten, den Vertrag ausdrücklich oder stillschweigend, nachdem sie Kenntnis von den maßgebenden Umständen erlangt hat oder wieder frei handeln konnte, so kann sie den Vertrag nicht mehr anfechten.

Artikel 54
Wirkungen der Anfechtung

1. Ein anfechtbarer Vertrag ist bis zur Anfechtung gültig, wird aber mit der Anfechtung rückwirkend ungültig.

2. Betrifft ein Anfechtungsgrund nur einzelne Vertragsbestimmungen, so beschränkt sich die Wirkung der Anfechtung auf diese Bestimmungen, es sei denn, es ist unangemessen, den Vertrag im Übrigen aufrechtzuerhalten.

3. Ob eine der Parteien ein Recht hat, die Herausgabe dessen, was aufgrund des Vertrags übertragen oder geliefert wurde, oder die Zahlung eines gleichwertigen Geldbetrags zu verlangen, bestimmt sich nach den Vorschriften des Kapitels 17 über die Rückabwicklung.

Artikel 55
Schadensersatz für Verluste

Eine Partei, die nach diesem Kapitel das Recht hat, einen Vertrag anzufechten, oder die dieses Recht hatte, bevor sie es durch Fristablauf oder Bestätigung verlor, hat unabhängig davon, ob der Vertrag angefochten wird, gegenüber der anderen Partei einen Anspruch auf Schadensersatz für Verluste infolge Irrtums, arglistiger Täuschung, Drohung oder unfairer Ausnutzung, sofern die andere Partei die maßgebenden Umstände kannte oder kennen musste.

Artikel 56
Ausschluss oder Einschränkung von Abhilfen

1. Abhilfen wegen arglistiger Täuschung, Drohung und unfairer Ausnutzung können weder unmittelbar noch mittelbar ausgeschlossen oder eingeschränkt werden.

2. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien Abhilfen wegen Irrtums weder unmittelbar noch mittelbar zum Nachteil des Verbrauchers ausschließen oder einschränken.

Artikel 57
Wahl der Abhilfe

Eine Partei, der nach diesem Kapitel eine Abhilfe wegen Umständen zusteht, die dieser Partei auch eine Abhilfe wegen Nichterfüllung eröffnen, kann jede dieser Abhilfen geltend machen.

Teil III Bestimmung des Vertragsinhalts

Kapitel 6 Auslegung

Artikel 58
Allgemeine Regeln zur Auslegung von Verträgen

1. Ein Vertrag wird nach dem gemeinsamen Willen der Parteien ausgelegt, auch wenn dieser nicht mit der normalen Bedeutung der im Vertrag verwendeten Ausdrücke übereinstimmt.

2. Wenn eine Partei einen im Vertrag verwendeten Ausdruck in einem bestimmten Sinne verstanden wissen wollte und dies der anderen Partei bei Vertragsschluss bewusst war oder hätte bewusst sein müssen, wird der Vertrag so ausgelegt, wie die erste Partei ihn verstanden wissen wollte.

3. Sofern die Absätze 1 und 2 nicht anders bestimmen, ist der Vertrag in dem Sinne auszulegen, den ihm eine vernünftige Person geben würde.

Artikel 59
Erhebliche Umstände

Bei der Auslegung des Vertrags können insbesondere berücksichtigt werden:

a) die Umstände, unter denen er geschlossen wurde, einschließlich der vorausgegangenen Verhandlungen,

b) das Verhalten der Parteien – auch nach Vertragsschluss,

c) die Auslegung, die von den Parteien bereits denselben oder ähnlichen Ausdrücken wie den im Vertrag verwendeten gegeben wurde,

d) Gebräuche, die von Parteien, die sich in der gleichen Situation befinden, als allgemein anwendbar angesehen würden,

e) Gepflogenheiten, die zwischen den Parteien entstanden sind,

f) die Bedeutung, die Ausdrücken in dem betreffenden Tätigkeitsbereich gewöhnlich gegeben wird,

g) die Natur und den Zweck des Vertrags und

h) das Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs.

Artikel 60
Auslegung im Lichte des gesamten Vertrags

In einem Vertrag verwendete Ausdrücke sind im Lichte des gesamten Vertrags auszulegen.

Artikel 61
Abweichende Sprachfassungen

Wird ein Vertrag in zwei oder mehr Sprachfassungen abgefasst, von denen keine als maßgebend bezeichnet ist, so gilt bei einer Abweichung zwischen den Sprachfassungen die Sprachfassung als maßgebend, in der der Vertrag ursprünglich abgefasst worden ist.

Artikel 62
Vorrang individuell ausgehandelter Vertragsbestimmungen

Soweit ein Widerspruch besteht, haben individuell ausgehandelte Vertragsbestimmungen Vorrang vor solchen, die im Sinne von Artikel 7 nicht individuell ausgehandelt worden sind.

Artikel 63
Vorrang wirksamkeitsorientierter Auslegung

Eine Auslegung, nach der Vertragsbestimmungen wirksam sind, hat Vorrang vor einer Auslegung, nach der das nicht der Fall ist.

Artikel 64
Auslegung zugunsten des Verbrauchers

1. Wenn Zweifel über die Bedeutung einer Vertragsbestimmung in einem Vertrag zwischen einem Unternehmer und einem Verbraucher besteht, gilt die für den Verbraucher günstigste Auslegung, es sei denn, die Bestimmung wurde vom Verbraucher gestellt.

2. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 65
Auslegungsregeln bei gestellten Vertragsbestimmungen

Wenn in einem Vertrag, der nicht unter Artikel 64 fällt, Zweifel an der Bedeutung einer nicht individuell ausgehandelten Vertragsbestimmung im Sinne von Artikel 7 besteht, so hat eine Auslegung der Bestimmung zu Lasten der Partei, die die Bestimmung gestellt hat, Vorrang.

Kapitel 7 Inhalt und Wirkungen

Artikel 66
Vertragsbestimmungen

Die Vertragsbestimmungen werden abgeleitet aus:

a) der Vereinbarung der Parteien vorbehaltlich zwingender Vorschriften des Gemeinsamen Europäischen Kaufrechts,

b) Gebräuchen oder Gepflogenheiten, an die die Parteien nach Artikel 67 gebunden sind,

c) Vorschriften des Gemeinsamen Europäischen Kaufrechts, die mangels einer anders lautenden Vereinbarung der Parteien Anwendung finden, und

d) Vertragsbestimmungen, die nach Artikel 68 herangezogen werden können.

Artikel 67
Gebräuche und Gepflogenheiten in Verträgen zwischen Unternehmern

1. In einem Vertrag zwischen Unternehmern sind die Parteien an Gebräuche gebunden, die sie als anwendbar vereinbart haben, und an zwischen ihnen entstandenen Gepflogenheiten.

2. Die Parteien sind an Gebräuche gebunden, die von Unternehmern, die sich in der gleichen Situation wie die Parteien befinden, als allgemein anwendbar angesehen würden.

3. Die Parteien sind an Gebräuche und Gepflogenheiten nur so weit gebunden, wie sie nicht individuell ausgehandelten Vertragsbestimmungen oder zwingenden Vorschriften des Gemeinsamen Europäischen Kaufrechts entgegenstehen.

Artikel 68
Vertragsbestimmungen, die herangezogen werden können

1. Wenn dies für Belange, die nicht ausdrücklich durch die Vereinbarung der Parteien, durch Gebräuche, Gepflogenheiten oder Vorschriften des Gemeinsamen Europäischen Kaufrechts geregelt sind, notwendig ist, kann eine zusätzliche Vertragsbestimmung herangezogen werden, insbesondere im Hinblick auf:

   (a) die Natur und den Zweck des Vertrags,

   (b) die Umstände, unter denen der Vertrag geschlossen wurde, und

   (c) das Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs.

2. Jede im Sinne von Absatz 1 herangezogene Vertragsbestimmung sollte, soweit möglich, so beschaffen sein, dass sie verwirklicht, was die Parteien wahrscheinlich vereinbart hätten, wenn sie die betreffenden Belange geregelt hätten.

3. Absatz 1 findet keine Anwendung, wenn die Parteien willentlich keine Regelung zu einer bestimmten Frage getroffen und akzeptiert haben, dass die eine oder andere Partei das Risiko trägt.

Artikel 69
Aus bestimmten vorvertraglichen Erklärungen abgeleitete Vertragsbestimmungen

1. Gibt der Unternehmer vor Vertragsschluss gegenüber der anderen Partei oder öffentlich eine Erklärung über die Eigenschaften dessen ab, was der Unternehmer nach dem Vertrag liefern soll, wird diese Erklärung Bestandteil des Vertrags, es sei denn,

   (a) die andere Partei wusste bei Vertragsschluss oder hätte wissen müssen, dass die Erklärung falsch war oder dass sie sich nicht auf eine derartige Bestimmung verlassen konnte, oder

   (b) die Entscheidung der anderen Partei zum Vertragsschluss konnte nicht durch die Erklärung beeinflusst werden.

2. Für die Zwecke des Absatzes 1 gilt eine Erklärung, die von einer Person abgegeben wird, die im Auftrag des Unternehmers mit der Werbung oder Vermarktung befasst ist, als durch den Unternehmer abgegeben.

3. Handelt es sich bei der anderen Partei um einen Verbraucher, wird für die Zwecke des Absatzes 1 eine öffentliche Erklärung, die im Vorfeld des Vertragsschlusses von oder im Auftrag eines Herstellers oder einer anderen Person abgegeben wurde, als vom Unternehmer abgegeben angesehen, es sei denn, der Unternehmer kannte diese Erklärung bei Vertragsschluss nicht und hätte sie auch nicht kennen müssen.

4. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 70
Pflicht zum Hinweis auf nicht individuell ausgehandelte Vertragsbestimmungen

1. Eine Partei kann sich nur dann auf die von ihr gestellten, nicht individuell ausgehandelten Vertragsbestimmungen im Sinne von Artikel 7 berufen, wenn die andere Partei diese Bestimmungen kannte oder wenn die Partei, die die Bestimmungen gestellt hat, vor oder bei Vertragsschluss angemessene Schritte unternommen hat, um die andere Partei darauf aufmerksam zu machen.

2. Für die Zwecke dieses Artikels reicht es im Verhältnis zwischen einem Unternehmer und einem Verbraucher nicht aus, wenn der Verbraucher auf die Vertragsbestimmungen lediglich durch einen Verweis auf diese Bestimmungen in

einem Vertragsdokument aufmerksam gemacht wird, selbst wenn die betreffende Partei das Dokument unterschreibt.

3. Die Parteien dürfen die Anwendung dieses Artikels nicht ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 71
Zusätzliche Zahlungen bei Verträgen zwischen einem Unternehmer und einem Verbraucher

1. Eine Vertragsbestimmung in einem Vertrag zwischen einem Unternehmer und einem Verbraucher, die den Verbraucher über die ausgewiesene Vergütung für die vertragliche Hauptverpflichtung des Unternehmers hinaus zu einer zusätzlichen Zahlung verpflichtet, ist für den Verbraucher, insbesondere, wenn sie durch die Verwendung von Standardoptionen eingefügt wurde, die der Verbraucher ausdrücklich ablehnen muss, um die zusätzliche Zahlung zu vermeiden, nicht bindend, es sei denn, der Verbraucher hat der zusätzlichen Zahlung, bevor er durch den Vertrag gebunden wurde, ausdrücklich zugestimmt. Hat der Verbraucher eine zusätzliche Zahlung geleistet, so kann er sie zurückverlangen.

2. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 72
Integrationsklauseln

1. Enthält ein schriftlicher Vertrag eine Klausel, die besagt, dass das Dokument alle Vertragsbestimmungen enthält (Integrationsklausel), sind frühere Erklärungen, Zusicherungen oder Vereinbarungen, die nicht in dem Dokument enthalten sind, nicht Bestandteil des Vertrags.

2. Sofern der Vertrag nichts anderes bestimmt, hindert eine Integrationsklausel die Parteien nicht daran, frühere Erklärungen zur Auslegung des Vertrags heranzuziehen.

3. Bei einem Vertrag zwischen einem Unternehmer und einem Verbraucher, ist der Verbraucher nicht durch eine Integrationsklausel gebunden.

4. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 73
Bestimmung des Preises

Kann der nach dem Vertrag zu zahlende Preis nicht auf andere Weise bestimmt werden, ist mangels anders lautender Angaben der Preis zu zahlen, der normalerweise unter vergleichbaren Umständen zum Zeitpunkt des Vertragsschlusses berechnet worden wäre, oder, wenn kein solcher Preis zu ermitteln ist, ein angemessener Preis.

Artikel 74
Einseitige Festsetzung durch eine Partei

1. Ist der Preis oder eine andere Vertragsbestimmung von einer Partei festzusetzen und ist diese Festsetzung grob unangemessen, so ist der Preis zu zahlen, der normalerweise unter vergleichbaren Umständen zum Zeitpunkt des Vertragsschlusses berechnet worden wäre, oder wenn kein solcher Preis zu ermitteln ist, ein angemessener Preis, beziehungsweise es gilt diejenige Vertragsbestimmung, die unter vergleichbaren Umständen zum Zeitpunkt des Vertragsschlusses normalerweise verwendet worden wäre oder, wenn keine solche Vertragsbestimmung zu ermitteln ist, eine angemessene Vertragsbestimmung.

2. Die Parteien dürfen die Anwendung dieses Artikels nicht ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 75
Festsetzung durch einen Dritten

1. Sind der Preis oder eine andere Vertragsbestimmung durch einen Dritten festzusetzen und kann dieser die Festsetzung nicht treffen oder tut er es aus anderen Gründen nicht, so kann ein Gericht eine andere Person bestellen, um die Festsetzung vorzunehmen, es sei denn, dass dies in Widerspruch zu den Vertragsbestimmungen steht.

2. Ist der von einem Dritten festgesetzte Preis oder eine andere von ihm festgesetzte Vertragsbestimmung grob unangemessen, so ist der Preis zu zahlen, der normalerweise unter vergleichbaren Umständen zum Zeitpunkt des Vertragsschlusses berechnet worden wäre, oder wenn kein solcher Preis zu ermitteln ist, ein angemessener Preis, beziehungsweise es gilt diejenige Vertragsbestimmung, die unter vergleichbaren Umständen zum Zeitpunkt des Vertragsschlusses normalerweise verwendet worden wäre oder, wenn keine solche Vertragsbestimmung zu ermitteln ist, eine angemessene Vertragsbestimmung.

3. Als „Gericht" im Sinne von Absatz 1 gilt auch ein Schiedsgericht.

4. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung des Absatzes 2 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 76
Sprache

Lässt sich die Sprache, die für die Kommunikation in Bezug auf den Vertrag oder daraus entstehende Rechte und Verpflichtungen verwendet werden soll, nicht anders bestimmen, so ist die zu verwendende Sprache die Sprache, die für das Zustandekommen des Vertrages verwendet wurde.

Artikel 77
Unbefristete Verträge

1. Verträge, die eine fortlaufende oder wiederkehrende Leistung zum Inhalt haben, können, wenn in den Vertragsbestimmungen nicht festgelegt ist, wann das Vertragsverhältnis endet, oder wenn festgelegt ist, dass das Vertragsverhältnis durch Kündigung endet, von jeder Partei innerhalb einer angemessenen Frist von höchstens zwei Monaten gekündigt werden.

2. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 78
Vertragsbestimmungen zugunsten Dritter

1. Die Vertragsparteien können zugunsten eines Dritten durch Vertrag ein Recht begründen. Der Dritte braucht zum Zeitpunkt des Vertragsschlusses nicht geboren oder bestimmt sein, muss aber bestimmt werden können.

2. Natur und Inhalt des Rechts des Dritten werden durch den Vertrag bestimmt. Bei diesem Recht kann es sich auch um den Ausschluss oder die Begrenzung der Haftung des Dritten gegenüber eine der Vertragsparteien handeln.

3. Schuldet eine der Vertragsparteien dem Dritten nach dem Vertrag die Erbringung einer Leistung,

   (a) stehen dem Dritten dieselben Rechte auf Erfüllung und Abhilfen wegen Nichterfüllung zu, die bestehen würden, wenn die Vertragspartei aufgrund eines Vertrags mit dem Dritten zur Leistung verpflichtet wäre, und

   (b) kann sich die verpflichtete Vertragspartei dem Dritten gegenüber auf alle Einwendungen berufen, auf die sie sich der anderen Vertragspartei gegenüber berufen könnte.

4. Der Dritte kann ein ihm übertragenes Recht durch Mitteilung an eine der Vertragsparteien zurückweisen, wenn dies vor der ausdrücklichen oder stillschweigenden Annahme dieses Rechts geschieht. Weist der Dritte das Recht zurück, gilt das Recht als dem Dritten nicht entstanden.

5. Die Vertragsparteien können die Vertragsbestimmung, die dem Dritten das Recht gewährt, aufheben oder abändern, solange dem Dritten nicht mitgeteilt wurde, dass ihm das Recht gewährt worden ist.

Kapitel 8 Unfaire Vertragsbestimmungen

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 79
Wirkung unfairer Vertragsbestimmungen

1. Eine von einer Partei gestellte Vertragsbestimmung, die unfair im Sinne der Abschnitte 2 und 3 dieses Kapitels ist, ist für die andere Partei nicht bindend.

2. Wenn der Vertrag ohne die unfaire Bestimmung Bestand haben kann, bleiben die übrigen Bestimmungen verbindlich.

Artikel 80
Ausnahmen von der Prüfung der Unfairness

1. Die Abschnitte 2 und 3 gelten nicht für Vertragsbestimmungen, die Regeln des Gemeinsamen Europäischen Kaufrechts aufgreifen, die gelten würden, wenn der Sachverhalt nicht durch die Vertragsbestimmungen geregelt würde.

2. Abschnitt 2 gilt nicht für den Hauptgegenstand des Vertrags oder für die Frage, ob die Höhe des zu zahlenden Preises angebracht ist, soweit der Unternehmer der Pflicht zur Transparenz gemäß Artikel 82 nachgekommen ist.

3. Abschnitt 3 gilt weder für den Hauptgegenstand des Vertrages noch für die Frage, ob die Höhe des zu zahlenden Preises angebracht ist.

Artikel 81
Zwingender Charakter der Vorschriften

Die Parteien dürfen die Anwendung dieses Kapitels weder ausschließen noch davon abweichen, noch dessen Wirkungen abändern.

ABSCHNITT 2 UNFAIRE VERTRAGSBESTIMMUNGEN BEI VERTRÄGEN ZWISCHEN EINEM UNTERNEHMER UND EINEM VERBRAUCHER

Artikel 82
Pflicht zur Transparenz bei nicht individuell ausgehandelten Vertragsbestimmungen

Wurden die Vertragsbestimmungen zwischen einem Unternehmer und einem Verbraucher im Sinne von Artikel 7 nicht individuell ausgehandelt, muss der Unternehmer dafür Sorge tragen, dass sie in einfacher und verständlicher Sprache abgefasst und mitgeteilt werden.

Artikel 83
Bedeutung von „unfair" in Verträgen zwischen einem Unternehmer und einem Verbraucher

1. In einem Vertrag zwischen einem Unternehmer und einem Verbraucher ist eine im Sinne von Artikel 7 nicht individuell ausgehandelte, vom Unternehmer gestellte Bestimmung im Sinne dieses Abschnitts unfair, wenn sie entgegen dem Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs in Bezug auf die vertraglichen Rechte und Verpflichtungen der Vertragsparteien ein erhebliches Ungleichgewicht zu Lasten des Verbrauchers herstellt.

2. Bei der Prüfung der Unfairness einer Vertragsbestimmung für die Zwecke dieses Abschnitts ist Folgendes zu berücksichtigen:

   (a) die Erfüllung der dem Unternehmer obliegenden Pflicht zur Transparenz gemäß Artikel 82,

   (b) das Wesen des Vertragsgegenstands,

   (c) die Umstände des Vertragsschlusses,

   (d) die übrigen Bestimmungen des Vertrags und

   (e) die Bestimmungen sonstiger Verträge, von denen der Vertrag abhängt.

Artikel 84
Per se unfaire Vertragsbestimmungen

Für die Zwecke dieses Abschnitts gilt eine Vertragsbestimmung als per se unfair, wenn deren Zweck oder Wirkung darin besteht,

a) die Haftung des Unternehmers infolge einer Handlung oder Unterlassung des Unternehmers oder einer in seinem Auftrag handelnden Person, durch die der Verbraucher Schaden an Leib oder Leben nimmt, auszuschließen oder einzuschränken;

b) die Haftung des Unternehmers für einen vorsätzlich oder grob fahrlässig verursachten Verlust oder Schaden beim Verbraucher auszuschließen oder einzuschränken;

c) die Verpflichtung des Unternehmers zur Einhaltung der von seinen Vertretern eingegangenen Zusagen einzuschränken oder seine Zusagen von der Erfüllung einer besonderen Bedingung abhängig zu machen, die ohne sein Zutun nicht zu erfüllen ist;

d) dem Verbraucher die Möglichkeit zu nehmen oder ihn daran zu hindern, Rechtsbehelfe bei Gericht einzulegen oder sonstige Beschwerdemittel zu ergreifen, und zwar insbesondere dadurch, dass dem Verbraucher auferlegt wird, die Streitigkeit ausschließlich im Wege eines Schiedsverfahrens zu regeln, das in den auf Verträge zwischen Unternehmern und Verbrauchern anwendbaren Rechtsvorschriften im Allgemeinen nicht vorgesehen ist;

e) den ausschließlichen Gerichtsstand für alle Streitigkeiten aus dem Vertrag einem Gericht zuzuweisen, das für den Ort zuständig ist, an dem der Unternehmer seinen Sitz hat, es sei denn, dieses Gericht ist auch für den Ort zuständig, an dem der Verbraucher seinen gewöhnlichen Aufenthalt hat;

f) dem Unternehmer das ausschließliche Recht einzuräumen, die Vertragsmäßigkeit der gelieferten Waren, der bereitgestellten digitalen Inhalte oder der erbrachten verbundenen Dienstleistungen festzustellen, oder ihm das ausschließliche Recht zur Auslegung der Vertragsbestimmungen zuzugestehen;

g) den Verbraucher, nicht aber den Unternehmer zur Einhaltung des Vertrags zu verpflichten;

h) vom Verbraucher zu verlangen, dass er für die Beendigung des Vertrags im Sinne des Artikels 8 strengere Formerfordernisse erfüllt als diejenigen, die für den Vertragsschluss galten;

i) dem Unternehmer für die Beendigung des Vertrags eine kürzere Frist einzuräumen als dem Verbraucher;

j) vom Verbraucher die Bezahlung nicht gelieferter Waren, nicht bereitgestellter digitaler Inhalte oder nicht erbrachter verbundener Dienstleistungen zu verlangen;

k) den nicht individuell ausgehandelten Vertragsbestimmungen im Sinne von Artikel 7 Vorrang vor den individuell ausgehandelten Vertragsbestimmungen einzuräumen oder ihnen den Vorzug zu geben.

Artikel 85
Vermutung der Unfairness

Für die Zwecke dieses Abschnitts besteht die Vermutung, dass eine Vertragsbestimmung unfair ist, wenn deren Zweck oder Wirkung darin besteht,

a) die für den Verbraucher verfügbaren Beweismittel einzuschränken oder dem Verbraucher die Beweislast aufzuerlegen, die rechtlich dem Unternehmer obliegen sollte;

b) die Abhilfen, die dem Verbraucher gegen den Unternehmer oder einen Dritten wegen Nichterfüllung der vertraglichen Verpflichtungen durch den Unternehmer zustehen, in unangemessener Weise auszuschließen oder zu beschränken;

c) das Recht auf Aufrechnung etwaiger Forderungen des Verbrauchers gegen den Unternehmer gegen etwaige Verbindlichkeiten des Verbrauchers gegenüber dem Unternehmer, in unangemessener Weise auszuschließen oder zu beschränken;

d) dem Unternehmer zu gestatten, vom Verbraucher gezahlte Beträge einzubehalten, wenn sich dieser gegen einen Vertragsschluss oder gegen die Erfüllung vertraglicher Verpflichtungen entscheidet, ohne für den Verbraucher eine Entschädigung in entsprechender Höhe durch den Unternehmer für den umgekehrten Fall vorzusehen;

e) dem Verbraucher, der seinen vertraglichen Verpflichtungen nicht nachkommt, eine unverhältnismäßig hohe Entschädigung oder eine festgelegte Zahlung wegen Nichterfüllung abzuverlangen;

f) dem Unternehmer zu gestatten, nach freiem Ermessen den Vertrag zu widerrufen oder den Vertrag im Sinne von Artikel 8 zu beenden, ohne dem Verbraucher dasselbe Recht einzuräumen, oder dem Unternehmer zu gestatten, für noch nicht erbrachte Leistungen bereits gezahlte Beträge einzubehalten, wenn dieser den Vertrag widerruft oder den Vertrag beendet;

g) es dem Unternehmer, außer bei Vorliegen schwerwiegender Gründe, zu ermöglichen, einen unbefristeten Vertrag ohne angemessene Frist zu beenden;

h) einen befristeten Vertrag automatisch zu verlängern, wenn der Verbraucher sich nicht gegenteilig äußert, und im Vertrag einen unangemessen frühen Zeitpunkt dafür festzulegen;

i) es einem Unternehmer zu ermöglichen, Vertragsbestimmungen einseitig ohne triftigen Grund, der im Vertrag festgelegt ist, zu ändern; dies berührt nicht Vertragsbestimmungen, nach denen sich ein Unternehmer das Recht vorbehält, die Bestimmungen eines unbefristeten Vertrags einseitig zu ändern, vorausgesetzt, dass der Unternehmer verpflichtet ist, den Verbraucher rechtzeitig hiervon in Kenntnis zu setzen, und es diesem freisteht, den Vertrag zu beenden, ohne dass ihm hierdurch Kosten entstehen;

j) es dem Unternehmer zu ermöglichen, einseitig ohne triftigen Grund Merkmale der zu liefernden Waren, digitalen Inhalte oder der zu erbringenden verbundenen Dienstleistungen oder sonstige Leistungsmerkmale zu ändern;

k) festzulegen, dass der Preis für die Waren, digitalen Inhalte oder verbundenen Dienstleistungen zum Zeitpunkt der Lieferung, Bereitstellung oder Erbringung festgesetzt wird, oder es dem Unternehmer zu ermöglichen, den Preis zu erhöhen, ohne dem Verbraucher das Recht einzuräumen, den Vertrag zu widerrufen, wenn der erhöhte Betrag im Verhältnis zu dem bei Vertragsschluss vereinbarten Preis zu hoch ist; dies berührt nicht Preisindexklauseln, wenn diese erlaubt sind, vorausgesetzt, dass die Methode, nach der sich die Preise ändern, ausdrücklich beschrieben wird;

l) den Verbraucher zu verpflichten, seine sämtlichen vertraglichen Verpflichtungen zu erfüllen, auch wenn der Unternehmer seine eigenen Verpflichtungen nicht erfüllt;

m) dem Unternehmer zu gestatten, seine vertraglichen Rechte und Verpflichtungen ohne Zustimmung des Verbrauchers zu übertragen, es sei denn, er überträgt sie auf eine von ihm beherrschte Tochtergesellschaft, oder die Übertragung ist das Ergebnis eines Zusammenschlusses oder eines ähnlich rechtmäßigen gesellschaftsrechtlichen Vorgangs und es ist nicht zu erwarten, dass der Verbraucher durch die Übertragung in seinen Rechten beeinträchtigt wird;

n) dem Unternehmer zu gestatten, wenn das Bestellte nicht verfügbar ist, etwas Gleichwertiges zu liefern, ohne dass der Verbraucher ausdrücklich über diese Möglichkeit und darüber informiert worden ist, dass der Unternehmer, wenn der Verbraucher ein Recht auf Ablehnung der Leistung ausübt, die Kosten der

Rücksendung des vom Verbraucher im Rahmen des Vertrags Empfangenen tragen muss;

o) es dem Unternehmer zu gestatten, sich eine unangemessen lange oder nicht hinreichend bestimmte Frist für die Annahme oder Ablehnung eines Angebots vorzubehalten;

p) es dem Unternehmer zu gestatten, sich eine unangemessen lange oder nicht hinreichend bestimmte Frist für die Erfüllung der vertraglichen Verpflichtungen vorzubehalten;

q) in unangemessener Weise die Abhilfen oder Einwände, die dem Verbraucher gegen den Unternehmer oder dessen Forderungen zustehen, auszuschließen oder zu beschränken;

r) die Erfüllung von vertraglichen Verpflichtungen durch den Unternehmer oder andere für den Verbraucher vorteilhafte Wirkungen des Vertrags besonderen Formerfordernissen zu unterwerfen, die unangemessen und gesetzlich nicht vorgeschrieben sind;

s) vom Verbraucher überhöhte Vorauszahlungen oder überhöhte Sicherheiten für die Erfüllung der Verpflichtungen zu verlangen;

t) den Verbraucher ohne Grund daran zu hindern, Lieferungen oder Reparaturleistungen von Dritten zu beziehen;

u) den Vertrag ohne Grund an einen anderen Vertrag mit dem Unternehmer, einem Tochterunternehmen oder einem Dritten in einer für den Verbraucher nicht zu erwartenden Weise zu koppeln;

v) dem Verbraucher die Beendigung eines unbefristeten Vertrags übermäßig zu erschweren;

w) die erstmalige Laufzeit eines Vertrages über die lang andauernde Lieferung von Waren, die Bereitstellung digitaler Inhalte oder die Erbringung verbundener Dienstleistungen und dessen etwaige Verlängerung auf mehr als ein Jahr festzusetzen, es sei denn, der Verbraucher kann unter Einhaltung einer Kündigungsfrist von höchstens 30 Tagen den Vertrag jederzeit beenden.

ABSCHNITT 3 UNFAIRE VERTRAGSBESTIMMUNGEN BEI VERTRÄGEN ZWISCHEN UNTERNEHMERN

Artikel 86
Bedeutung von „unfair“ in Verträgen zwischen Unternehmern

1. In einem Vertrag zwischen Unternehmern gilt eine Vertragsbestimmung für die Zwecke dieses Abschnitts nur dann als unfair, wenn

   (a) sie Bestandteil von nicht individuell ausgehandelten Vertragsbestimmungen im Sinne von Artikel 7 ist und

(b) so beschaffen ist, dass ihre Verwendung unter Verstoß gegen das Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs gröblich von der guten Handelspraxis abweicht.

2. Bei der Prüfung der Unfairness einer Vertragsbestimmung für die Zwecke dieses Abschnitts ist Folgendes zu berücksichtigen:

(a) das Wesen des Vertragsgegenstands,

(b) die Umstände des Vertragsschlusses,

(c) die übrigen Vertragsbestimmungen und

(d) die Bestimmungen sonstiger Verträge, von denen der Vertrag abhängt.

Teil IV Verpflichtungen und Abhilfen der Parteien eines Kaufvertrags oder eines Vertrags über die Bereitstellung digitaler Inhalte

Kapitel 9 Allgemeine Bestimmungen

Artikel 87
Nichterfüllung und wesentliche Nichterfüllung

1. Die Nichterfüllung einer Verpflichtung ist jegliches Ausbleiben der Erfüllung der Verpflichtung, unabhängig davon, ob entschuldigt oder nicht, und schließt Folgendes ein:

   (a) die Nichtlieferung oder verspätete Lieferung der Waren,

   (b) die Nichtbereitstellung oder verspätete Bereitstellung digitaler Inhalte,

   (c) die Lieferung nicht vertragsgemäßer Waren,

   (d) die Bereitstellung nicht vertragsgemäßer digitaler Inhalte,

   (e) die Nichtzahlung oder verspätete Zahlung des Preises und

   (f) jede sonstige behauptete Erfüllung, die nicht vertragsgemäß ist.

2. Die Nichterfüllung einer Verpflichtung durch eine Partei ist wesentlich, wenn

   (a) sie der anderen Partei einen erheblichen Teil dessen vorenthält, was diese nach dem Vertrag erwarten durfte, es sei denn, dass die nichterfüllende Partei zum Zeitpunkt des Vertragsschlusses diese Folge nicht vorausgesehen hat und auch nicht voraussehen konnte, oder

   (b) sie klar erkennen lässt, dass sich die andere Partei nicht auf die künftige Erfüllung durch die nichterfüllende Partei verlassen kann.

Artikel 88
Entschuldigte Nichterfüllung

1. Die Nichterfüllung einer Verpflichtung durch eine Partei ist entschuldigt, wenn sie auf einem außerhalb des Einflussbereichs dieser Partei liegenden Hindernis beruht und wenn von dieser Partei nicht erwartet werden konnte, das Hindernis zum Zeitpunkt des Vertragsschlusses in Betracht zu ziehen oder das Hindernis oder dessen Folgen zu vermeiden oder zu überwinden.

2. Besteht das Hindernis nur vorübergehend, so ist die Nichterfüllung für den Zeitraum entschuldigt, in dem das Hindernis besteht. Läuft die Verzögerung jedoch auf eine wesentliche Nichterfüllung hinaus, kann die andere Partei sie als solche behandeln.

3. Die Partei, die nicht zur Erfüllung in der Lage ist, hat die Pflicht sicherzustellen, dass die andere Partei von dem Hindernis und dessen Auswirkungen auf die Fähigkeit der ersteren Partei zur Erfüllung unverzüglich Kenntnis erhält, nachdem die erstere Partei diese Umstände erkannt hat oder hätte erkennen müssen. Die andere Partei hat Anspruch auf Schadensersatz für alle Verluste, die sich aus einer Verletzung dieser Pflicht ergeben.

Artikel 89
Änderung der Umstände

1. Eine Verpflichtung ist zu erfüllen, auch wenn die Erfüllung belastender geworden ist, sei es, weil sich die Kosten der Leistung erhöht haben oder weil sich der Wert der Gegenleistung vermindert hat.

Wird die Erfüllung wegen einer außergewöhnlichen Änderung der Umstände zu einer übermäßigen Belastung, sind die Parteien verpflichtet, Verhandlungen aufzunehmen, um den Vertrag anzupassen oder zu beenden.

2. Können die Parteien innerhalb einer angemessenen Frist keine Einigung erzielen, kann ein Gericht auf Antrag einer Partei

   (a) den Vertrag in einer Weise anpassen, die dem entspricht, was die Parteien zum Zeitpunkt des Vertragsschlusses vereinbart hätten, wenn sie die Änderung der Umstände in Betracht gezogen hätten, oder

   (b) den Vertrag im Sinne von Artikel 8 zu einem Zeitpunkt und unter Bedingungen, die das Gericht bestimmt, beenden.

3. Absätze 1 und 2 gelten nur, wenn

   (a) die Änderung der Umstände nach Abschluss des Vertrages eingetreten ist,

   (b) die Partei, die sich auf die Änderung der Umstände beruft, die Möglichkeit oder das Ausmaß einer solchen Änderung zu jener Zeit nicht in Betracht gezogen hat und auch nicht in Betracht ziehen musste und

   (c) die benachteiligte Partei das Risiko einer Änderung der Umstände nicht übernommen hat und auch nicht angenommen werden kann, dass sie es übernommen hätte.

4. Als „Gericht“ im Sinne der Absätze 2 und 3 gilt auch ein Schiedsgericht.

Artikel 90
Erweiterte Anwendung der Vorschriften über Zahlungen sowie über die Nichtannahme von Waren oder digitalen Inhalten

1. Sofern nicht anders bestimmt, gelten die Vorschriften in Kapitel 12 über die Zahlung des Preises durch den Käufer mit entsprechenden Anpassungen auch für andere Zahlungen.

2. Artikel 97 gilt mit entsprechenden Anpassungen für andere Fälle, in denen eine Person im Besitz von Waren oder digitalen Inhalten verbleibt, weil eine andere Person diese Gegenstände nicht annimmt, obwohl sie dazu verpflichtet ist.

Kapitel 10 Verpflichtungen des Verkäufers

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 91
Hauptverpflichtungen des Verkäufers

Der Verkäufer von Waren oder der Lieferant digitaler Inhalte (in diesem Teil „Verkäufer“) muss

a) die Waren liefern oder die digitalen Inhalte bereitstellen,

b) das Eigentum an den Waren einschließlich an dem materiellen Datenträger, auf dem die digitalen Inhalte bereitgestellt werden, übertragen,

c) sicherstellen, dass die Waren oder digitalen Inhalte vertragsgemäß sind,

d) sicherstellen, dass der Käufer das Recht hat, die digitalen Inhalte entsprechend dem Vertrag zu nutzen, und

e) Dokumente, die die Waren oder digitalen Inhalte vertreten oder diese betreffen, übergeben, wenn dies vertraglich vorgesehen ist.

Artikel 92
Erfüllung durch einen Dritten

1. Der Verkäufer kann eine andere Person mit der Erfüllung betrauen, sofern den Vertragsbestimmungen zufolge keine persönliche Leistung des Verkäufers geschuldet ist.

2. Der Verkäufer, der eine andere Person mit der Erfüllung betraut, bleibt für die Erfüllung verantwortlich.

3. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung des Absatzes 2 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen ändern.

ABSCHNITT 2 LIEFERUNG

Artikel 93
Ort der Lieferung

1. Kann der Ort der Lieferung nicht anderweitig bestimmt werden, so ist Ort der Lieferung

(a) im Falle eines Verbraucherkaufvertrags oder eines Vertrags über die Bereitstellung digitaler Inhalte, bei dem es sich um einen Fernabsatzvertrag oder einen außerhalb von Geschäftsräumen geschlossenen Vertrag handelt oder in dem sich der Verkäufer verpflichtet hat, für die Beförderung bis zum Käufer zu sorgen, der Aufenthaltsort des Verbrauchers zum Zeitpunkt des Vertragsschlusses;

(b) in allen anderen Fällen,

i) in denen der Kaufvertrag die Beförderung der Waren durch einen Beförderer oder eine Reihe von Beförderern einschließt, die am nächsten gelegene Abholstelle des ersten Beförderers;

ii) in denen der Vertrag keine Beförderung einschließt, der Geschäftssitz des Verkäufers zum Zeitpunkt des Vertragsschlusses.

2. Hat der Verkäufer mehr als einen Geschäftssitz, ist für die Zwecke von Absatz 1 Buchstabe b derjenige Geschäftssitz maßgebend, der die engste Beziehung zu der Lieferverpflichtung aufweist.

Artikel 94
Art der Lieferung

1. Sofern nicht anders vereinbart, erfüllt der Verkäufer seine Lieferverpflichtung

(a) im Falle eines Verbraucherkaufvertrags oder eines Vertrags über die Bereitstellung digitaler Inhalte, bei dem es sich um einen Fernabsatzvertrag oder einen außerhalb von Geschäftsräumen geschlossenen Vertrag handelt oder in dem sich der Verkäufer verpflichtet hat, für die Beförderung bis zum Käufer zu sorgen, durch die Übertragung des Besitzes an den Waren beziehungsweise durch die Übertragung der Kontrolle über die digitalen Inhalte auf den Verbraucher;

(b) in anderen Fällen, in denen der Vertrag die Beförderung der Waren durch einen Beförderer einschließt, durch Übergabe der Waren an den ersten Beförderer zur Versendung an den Käufer und durch Übergabe aller notwendigen Dokumente an den Käufer, die es diesem ermöglichen, die Waren von dem Beförderer, der die Waren hat, zu übernehmen, oder

(c) in Fällen, die nicht unter Buchstabe a oder b fallen, durch Bereitstellung der Waren oder der digitalen Inhalte an den Käufer oder, wenn vereinbart wurde, dass der Verkäufer nur die Waren vertretende Dokumente liefern muss, durch Übergabe dieser Dokumente.

2. Die Vorschriften in Absatz 1 Buchstaben a und c über den Verbraucher oder den Käufer gelten auch für einen Dritten, der nicht der Beförderer ist und der vom Verbraucher oder vom Käufer vertragsgemäß bezeichnet worden ist.

Artikel 95
Zeitpunkt der Lieferung

1. Lässt sich der Lieferzeitpunkt nicht anderweitig bestimmen, müssen die Waren oder digitalen Inhalte unverzüglich nach Vertragsschluss geliefert werden.

2. Bei Verträgen zwischen einem Unternehmer und einem Verbraucher muss der Unternehmer die Waren oder digitalen Inhalte, sofern die Parteien nichts anderes vereinbart haben, innerhalb von 30 Tagen nach Vertragsschluss liefern.

Artikel 96
Verpflichtungen des Verkäufers bezüglich der Beförderung der Waren

1. Ist der Verkäufer nach dem Vertrag verpflichtet, für die Beförderung der Waren zu sorgen, so hat er die Verträge zu schließen, die zur Beförderung an den festgesetzten Ort mit den nach den Umständen angemessenen Beförderungsmitteln und zu den für solche Beförderungen üblichen Bedingungen erforderlich sind.

2. Übergibt der Verkäufer die Waren vertragsgemäß einem Beförderer und sind die Waren nicht deutlich durch daran angebrachte Kennzeichen, durch Beförderungsdokumente oder auf andere Weise als die vertragsgemäß zu liefernden Waren zu erkennen, so hat der Verkäufer dem Käufer die Versendung mitzuteilen und dabei die Waren im Einzelnen zu bezeichnen.

3. Ist der Verkäufer vertraglich nicht zum Abschluss einer Transportversicherung verpflichtet, so hat er dem Käufer auf dessen Verlangen alle ihm verfügbaren Informationen mitzuteilen, die für den Abschluss einer solchen Versicherung durch den Käufer erforderlich sind.

Artikel 97
Nichtannahme der Waren oder digitalen Inhalte durch den Käufer

1. Verbleibt der Verkäufer im Besitz der Waren oder digitalen Inhalte, weil der Käufer sie nicht angenommen hat, obwohl er dazu verpflichtet ist, hat der Verkäufer angemessene Vorkehrungen zu ihrem Schutz und ihrer Erhaltung zu treffen.

2. Der Verkäufer kann seine Lieferverpflichtung erfüllen, indem er

   (a) die Waren oder digitalen Inhalte zu angemessenen Bedingungen bei einem Dritten zugunsten des Käufers hinterlegt und diesen davon benachrichtigt oder

   (b) die Waren oder digitalen Inhalte nach Benachrichtigung des Käufers zu angemessenen Bedingungen verkauft und dem Käufer den Nettoerlös auszahlt.

3. Der Verkäufer ist berechtigt, die Erstattung aller sachlich gerechtfertigten Kosten zu verlangen oder diese aus dem Verkaufserlös einzubehalten.

Artikel 98
Wirkung in Bezug auf den Gefahrübergang

Die Wirkung der Lieferung in Bezug auf den Gefahrübergang ist in Kapitel 14 geregelt.

ABSCHNITT 3 VERTRAGSMÄßIGKEIT DER WAREN UND DIGITALEN INHALTE

Artikel 99
Vertragsmäßigkeit

1. Die Waren oder digitalen Inhalte sind vertragsgemäß, wenn sie

   (a) in Menge, Qualität und Art den Anforderungen des Vertrags entsprechen,

   (b) hinsichtlich Behältnis oder Verpackung den Anforderungen des Vertrags entsprechen und

   (c) den Anforderungen des Vertrags entsprechend mit sämtlichem Zubehör, Montageanleitungen oder anderen Anleitungen geliefert werden.

2. Um den Anforderungen des Vertrags zu entsprechen, müssen die Waren oder digitalen Inhalte überdies den Anforderungen der Artikel 100, 101 und 102 genügen, soweit die Parteien nichts anderes vereinbart haben.

3. In einem Verbraucherkaufvertrag ist eine Vereinbarung, die von den Anforderungen der Artikel 100, 102 und 103 zum Nachteil des Verbrauchers abweicht, nur dann gültig, wenn dem Verbraucher der besondere Umstand der Waren oder digitalen Inhalte zum Zeitpunkt des Vertragsschlusses bekannt war und er die Waren oder digitalen Inhalte bei Vertragsschluss als vertragsgemäß akzeptiert hat.

4. In einem Verbraucherkaufvertrag dürfen die Parteien die Anwendung des Absatzes 3 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder seine Wirkungen abändern.

Artikel 100
Kriterien für die Vertragsmäßigkeit der Waren und digitalen Inhalte

Die Waren oder digitalen Inhalte müssen:

a) für jeden bestimmten Zweck geeignet sein, der dem Verkäufer zum Zeitpunkt des Vertragsschlusses zur Kenntnis gebracht wurde, außer wenn sich aus den Umständen ergibt, dass der Käufer nicht auf die Sachkenntnis und das Urteilsvermögen des Verkäufers vertraute oder vernünftigerweise nicht hätte vertrauen dürfen;

b) sich für die Zwecke eignen, für die Waren oder digitale Inhalte der gleichen Art gewöhnlich gebraucht werden;

c) die Eigenschaften der Waren oder digitalen Inhalte besitzen, die der Verkäufer dem Käufer als Probe oder Muster vorgelegt hat;

d) in der für Waren dieser Art üblichen Weise oder, falls es eine solche Weise nicht gibt, in einer für die Erhaltung und den Schutz der Waren angemessenen Weise umschlossen und verpackt sein;

e) mit solchem Zubehör, Montageanleitungen und anderen Anleitungen geliefert werden, deren Erhalt der Käufer erwarten kann;

f) diejenigen Eigenschaften und diejenige Tauglichkeit besitzen, die in einer vorvertraglichen Erklärung angegeben sind, die gemäß Artikel 69 Teil der Vertragsbestimmungen ist, und

g) diejenigen Eigenschaften und diejenige Tauglichkeit besitzen, die der Käufer erwarten kann. Wenn zu bestimmen ist, was der Verbraucher von digitalen Inhalten erwarten kann, ist dem Umstand Rechnung zu tragen, ob die digitalen Inhalte gegen Zahlung eines Preises bereitgestellt wurden oder nicht.

Artikel 101
Unsachgemäße Montage oder Installierung bei einem Verbraucherkaufvertrag

1. Werden Waren oder digitale Inhalte, die aufgrund eines Verbraucherkaufvertrags geliefert wurden, unsachgemäß montiert oder installiert, ist jede hierdurch verursachte Vertragswidrigkeit als Vertragswidrigkeit der Waren oder digitalen Inhalte anzusehen, wenn

   (a) die Waren oder digitalen Inhalte vom Verkäufer oder unter seiner Verantwortung montiert oder installiert wurden oder

   (b) die Waren oder digitalen Inhalte zur Montage oder Installierung durch den Verbraucher bestimmt waren und die unsachgemäße Montage oder Installierung auf einen Mangel in der Anleitung zurückzuführen ist.

2. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 102
Rechte oder Ansprüche Dritter

1. Die Waren oder digitalen Inhalte müssen frei von Rechten oder nicht offensichtlich unbegründeten Ansprüchen Dritter sein.

2. In Bezug auf Rechte oder Ansprüche aus geistigem Eigentum gilt vorbehaltlich der Absätze 3 und 4, dass die Waren oder digitalen Inhalte frei sein müssen von Rechten oder nicht offensichtlich unbegründeten Ansprüchen Dritter, die

   (a) nach dem Recht des Staates bestehen, in dem die Waren oder digitalen Inhalte entsprechend dem Vertrag genutzt werden, oder in Ermangelung einer solchen Vereinbarung die nach dem Recht des Staates bestehen, in dem der Käufer

seinen Geschäftssitz hat, oder bei Verträgen zwischen einem Unternehmer und einem Verbraucher nach dem Recht des Staates, in dem der Verbraucher entsprechend seiner Angabe zum Zeitpunkt des Vertragsschlusses seinen gewöhnlichen Aufenthalt hat, und

(b) der Verkäufer zum Zeitpunkt des Vertragsschlusses kannte oder hätte kennen müssen.

3. Bei Verträgen zwischen Unternehmen findet Absatz 2 keine Anwendung, wenn der Käufer die Rechte oder Ansprüche aus geistigem Eigentum zum Zeitpunkt des Vertragsschlusses kannte oder hätte kennen müssen.

4. Bei Verträgen zwischen einem Unternehmer und einem Verbraucher findet Absatz 2 keine Anwendung, wenn der Verbraucher die Rechte oder Ansprüche aus geistigem Eigentum zum Zeitpunkt des Vertragsschlusses kannte oder hätte kennen müssen.

5. Bei Verträgen zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 103
Beschränkung der Anforderung an die Vertragsmäßigkeit digitaler Inhalte

Digitale Inhalte gelten nicht allein deshalb als vertragswidrig, weil nach Vertragsschluss aktualisierte digitale Inhalte verfügbar waren.

Artikel 104
Kenntnis des Käufers von der Vertragswidrigkeit bei einem Vertrag zwischen Unternehmern

Bei einem Vertrag zwischen Unternehmern haftet der Verkäufer nicht für die Vertragswidrigkeit der Waren, wenn der Käufer zum Zeitpunkt des Vertragsschlusses die Vertragswidrigkeit kannte oder hätte kennen müssen.

Artikel 105
Maßgeblicher Zeitpunkt für die Feststellung der Vertragsmäßigkeit

1. Der Verkäufer haftet für jede Vertragswidrigkeit, die zum Zeitpunkt des Übergangs der Gefahr auf den Käufer nach Kapitel 14 besteht.

2. Bei einem Verbraucherkaufvertrag wird vermutet, dass eine Vertragswidrigkeit, die innerhalb von sechs Monaten nach dem Übergang der Gefahr auf den Käufer offenbar wird, zum Zeitpunkt des Gefahrübergangs bestanden hat, es sei denn, dies ist mit der Art der Waren oder digitalen Inhalte oder mit der Art der Vertragswidrigkeit unvereinbar.

3. Im Falle des Artikels 101 Absatz 1 Buchstabe a gilt jede Bezugnahme in Absatz 1 oder Absatz 2 auf den Zeitpunkt des Übergangs der Gefahr auf den Käufer als Bezugnahme auf den Zeitpunkt, zu dem die Montage oder Installierung

abgeschlossen ist. Im Falle des Artikels 101 Absatz 1 Buchstabe b ist für den Gefahrübergang der Zeitpunkt maßgebend, zu dem der Verbraucher die Montage oder Installierung innerhalb einer angemessenen Zeit abgeschlossen hat.

4. Muss der Unternehmer die digitalen Inhalte zu einem späteren Zeitpunkt aktualisieren, hat er dafür zu sorgen, dass die Vertragsmäßigkeit der digitalen Inhalte während der Vertragslaufzeit gewahrt ist.

5. Bei Verträgen zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Kapitel 11 Abhilfen des Käufers

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 106
Übersicht über die Abhilfen des Käufers

1. Hat der Verkäufer eine Verpflichtung nicht erfüllt, kann der Käufer

   (a) die Erfüllung gemäß Abschnitt 3 verlangen, die die Erfüllung der betreffenden Verpflichtung, die Reparatur oder den Ersatz der Waren oder digitalen Inhalte einschließt,

   (b) seine eigene Leistung gemäß Abschnitt 4 zurückhalten,

   (c) gemäß Abschnitt 5 den Vertrag beenden und gemäß Kapital 17 die Erstattung des bereits gezahlten Preises verlangen,

   (d) den Preis gemäß Abschnitt 6 mindern und

   (e) Schadensersatz gemäß Kapitel 16 verlangen.

2. Handelt es sich bei dem Käufer um einen Unternehmer, gilt Folgendes:

   (a) Das Recht des Käufers auf Abhilfe mit Ausnahme der Zurückhaltung seiner Leistung besteht vorbehaltlich der Heilung der Nichterfüllung durch den Verkäufer gemäß Abschnitt 2, und

   (b) das Recht des Käufers, sich auf Vertragswidrigkeit zu berufen, besteht vorbehaltlich der Prüfungs- und Mitteilungspflichten gemäß Abschnitt 7.

3. Handelt es sich bei dem Käufer um einen Verbraucher, gilt Folgendes:

   (a) Die Rechte des Käufers bestehen ungeachtet der Heilung der Nichterfüllung durch den Verkäufer, und

   (b) die Prüfungs- und Mitteilungspflichten gemäß Abschnitt 7 finden keine Anwendung.

4. Ist die Nichterfüllung des Verkäufers entschuldigt, kann der Käufer von den in Absatz 1 genannten Abhilfen Gebrauch machen mit Ausnahme der Forderung nach Erfüllung und Schadensersatz.

5. Der Käufer kann von den in Absatz 1 genannten Abhilfen nicht Gebrauch machen, soweit er die Nichterfüllung des Verkäufers verursacht hat.

6. Abhilfen, die miteinander vereinbar sind, können nebeneinander geltend gemacht werden.

Artikel 107
Beschränkung der Abhilfen bei nicht gegen Zahlung eines Preises bereitgestellten digitalen Inhalten

Der Käufer kann von den in Artikel 106 Absatz 1 Buchstaben a bis d genannten Abhilfen nicht Gebrauch machen, wenn die digitalen Inhalte nicht gegen Zahlung eines Preises bereitgestellt werden. Der Käufer kann für Verluste oder Schäden an seinem Eigentum einschließlich an der Hardware, Software und an den Daten, die durch die Vertragswidrigkeit der gelieferten digitalen Inhalte verursacht wurden, nur Schadensersatz gemäß Artikel 106 Absatz 1 Buchstabe e verlangen mit Ausnahme des Ersatzes des dem Käufer durch diesen Schaden entgangenen Gewinns.

Artikel 108
Zwingender Charakter der Vorschriften

Bei Verträgen zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Kapitels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern, bevor der Verbraucher dem Unternehmer die Vertragswidrigkeit zur Kenntnis gebracht hat.

ABSCHNITT 2 HEILUNG DURCH DEN VERKÄUFER

Artikel 109
Heilung durch den Verkäufer

1. Ein Verkäufer, der die Leistung vorzeitig angeboten hat und dem mitgeteilt wurde, dass dies nicht vertragsgemäß ist, darf die Leistung erneut und vertragsgemäß anbieten, wenn dies innerhalb der Leistungszeit möglich ist.

2. In nicht von Absatz 1 erfassten Fällen kann ein Verkäufer, der eine nicht vertragsgemäße Leistung angeboten hat, unverzüglich nach seiner Unterrichtung über die Vertragswidrigkeit die Heilung auf eigene Kosten anbieten.

3. Ein Angebot zur Heilung wird durch eine Mitteilung über die Beendigung des Vertrags nicht ausgeschlossen.

4. Der Käufer darf ein Angebot zur Heilung nur dann ablehnen, wenn

   (a) die Heilung nicht umgehend und nicht ohne erhebliche Unannehmlichkeiten für den Käufer bewirkt werden kann,

   (b) der Käufer Grund zu der Annahme hat, dass er sich nicht auf die künftige Leistung durch den Verkäufer verlassen kann, oder

   (c) eine verspätete Erfüllung einer wesentlichen Nichterfüllung gleichkäme.

5. Der Verkäufer verfügt über einen angemessenen Zeitraum für die Heilung.

6. Der Käufer darf seine Leistung bis zur Heilung zurückhalten, aber seine sonstigen Rechte, die mit der Einräumung einer Frist für die Heilung durch den Verkäufer nicht vereinbar sind, sind bis zum Ablauf dieser Frist ausgesetzt.

7. Ungeachtet einer Heilung behält der Käufer das Recht, Schadensersatz wegen Verspätung sowie für jeden Schaden zu verlangen, der durch die Heilung verursacht oder nicht abgewendet wird.

ABSCHNITT 3 FORDERUNG NACH ERFÜLLUNG

Artikel 110
Forderung nach Erfüllung der Verpflichtungen des Verkäufers

1. Der Käufer ist berechtigt, die Erfüllung der Verpflichtungen des Verkäufers zu verlangen.

2. Die Erfüllung, die verlangt werden darf, umfasst die kostenlose Abhilfe im Falle einer nicht vertragsgemäßen Leistung.

3. Erfüllung kann nicht verlangt werden, wenn

   (a) die Erfüllung unmöglich wäre oder rechtswidrig geworden ist, oder

   (b) die Erfüllung im Vergleich zu dem Vorteil, den der Käufer dadurch erlangen würde, unverhältnismäßig aufwändig oder kostspielig wäre.

Artikel 111
Wahl des Verbrauchers zwischen Reparatur und Ersatzlieferung

1. Muss der Unternehmer bei einem Verbraucherkaufvertrag einer Vertragswidrigkeit gemäß Artikel 110 Absatz 2 abhelfen, kann der Verbraucher zwischen Reparatur und Ersatzlieferung wählen, es sei denn, die gewählte Möglichkeit wäre rechtswidrig oder unmöglich oder würde dem Unternehmer im Vergleich zur anderen Wahlmöglichkeit unverhältnismäßig hohe Kosten auferlegen unter Berücksichtigung

   (a) des Werts, den die Waren hätten, wenn sie vertragsgemäß wären,

   (b) der Erheblichkeit der Vertragswidrigkeit und

   (c) des Umstands, ob die alternative Abhilfe ohne erhebliche Unannehmlichkeiten für den Verbraucher geleistet werden kann.

2. Hat der Verbraucher eine Abhilfe durch Reparatur oder Ersatzlieferung gemäß Absatz 1 verlangt, kann er nur dann von anderen Abhilfen Gebrauch machen, wenn der Unternehmer die Reparatur oder die Ersatzlieferung nicht innerhalb einer angemessenen Frist, die 30 Tage nicht überschreiten darf, durchgeführt hat. Während dieser Zeit darf der Verbraucher seine Leistung jedoch zurückhalten.

Artikel 112
Rücknahme ersetzter Gegenstände

1. Hat der Verkäufer der Vertragswidrigkeit durch Ersatzlieferung abgeholfen, hat er das Recht und die Pflicht, den ersetzten Gegenstand auf seine Kosten zurückzunehmen.

2. Der Käufer haftet nicht auf Wertersatz für die Nutzung des ersetzten Gegenstands in der Zeit vor der Ersatzlieferung.

ABSCHNITT 4 ZURÜCKHALTUNG DER LEISTUNG DURCH DEN KÄUFER

Artikel 113
Recht auf Zurückhaltung der Leistung

1. Ein Käufer, der gleichzeitig mit oder nach der Leistung des Verkäufers erfüllen muss, hat das Recht, seine Leistung zurückzuhalten, bis der Verkäufer seine Leistung angeboten oder erbracht hat.

2. Ein Käufer, der vor der Leistung des Verkäufers erfüllen muss und Grund zu der Annahme hat, dass der Verkäufer nicht fristgemäß erfüllen wird, kann seine Leistung so lange zurückhalten, wie diese Annahme fortbesteht.

3. Die Leistung, die nach diesem Artikel zurückgehalten werden kann, umfasst die ganze oder einen Teil der Leistung, soweit dies durch die Nichterfüllung gerechtfertigt ist. Sind die Verpflichtungen des Verkäufers in selbstständigen Teilleistungen zu erfüllen oder auf andere Weise teilbar, kann der Käufer seine Leistung nur im Verhältnis zu der nichterfüllten Teilleistung des Verkäufers zurückhalten, es sei denn, die Nichterfüllung durch den Verkäufer rechtfertigt die Zurückhaltung der gesamten Leistung des Käufers.

ABSCHNITT 5 BEENDIGUNG DES VERTRAGS

Artikel 114
Beendigung wegen Nichterfüllung

1. Der Käufer kann im Sinne von Artikel 8 den Vertrag beenden, wenn die Nichterfüllung des Verkäufers im Rahmen des Vertrags wesentlich im Sinne von Artikel 87 Absatz 2 ist.

2. Bei einem Verbraucherkaufvertrag und einem Vertrag zwischen einem Unternehmer und einem Verbraucher über die Bereitstellung digitaler Inhalte kann der Verbraucher den Vertrag beenden, wenn Nichterfüllung vorliegt, weil die Waren nicht vertragsgemäß sind, es sei denn, die Vertragswidrigkeit der Waren ist unerheblich.

Artikel 115
Beendigung wegen verspäteter Lieferung nach Setzen einer Nachfrist für die Erfüllung

1. Ein Käufer kann im Fall einer verspäteten Lieferung, die nicht als solche als wesentlich anzusehen ist, den Vertrag beenden, wenn er dem Verkäufer in einer Mitteilung eine angemessene Nachfrist zur Erfüllung setzt und der Verkäufer nicht innerhalb dieser Frist erfüllt.

2. Die Nachfrist gemäß Absatz 1 gilt als angemessen, wenn der Verkäufer ihr nicht unverzüglich widerspricht.

3. Bestimmt die Mitteilung, dass ohne Weiteres Beendigung eintreten soll, wenn der Verkäufer nicht innerhalb der in der Mitteilung gesetzten Frist erfüllt, wird die Beendigung nach Ablauf dieser Frist ohne weitere Mitteilung wirksam.

Artikel 116
Beendigung wegen voraussichtlicher Nichterfüllung

Der Käufer kann den Vertrag beenden, bevor die Erfüllung fällig wird, wenn der Verkäufer erklärt hat oder anderweitig offensichtlich ist, dass Nichterfüllung eintreten wird, und wenn die Nichterfüllung die Beendigung des Vertrags rechtfertigen würde.

Artikel 117
Umfang des Beendigungsrechts

1. Sind die vertraglichen Verpflichtungen des Verkäufers in selbstständigen Teilleistungen zu erfüllen oder auf andere Weise teilbar, so kann der Käufer, wenn für einen Teil, dem ein Preis zugeordnet werden kann, ein Beendigungsgrund nach diesem Abschnitt besteht, den Vertrag nur in Bezug auf diesen Teil beenden.

2. Absatz 1 gilt nicht, wenn vom Käufer nicht erwartet werden kann, dass er die Leistung der anderen Teile annimmt, oder die Nichterfüllung die Beendigung des gesamten Vertrags rechtfertigt.

3. Sind die vertraglichen Verpflichtungen des Verkäufers unteilbar oder kann für einen Teil der Leistung kein Preis zugeordnet werden, kann der Käufer den Vertrag nur dann beenden, wenn die Nichterfüllung die Beendigung des gesamten Vertrags rechtfertigt.

Artikel 118
Mitteilung über die Beendigung des Vertrags

Das Recht auf Vertragsbeendigung nach diesem Abschnitt wird durch Mitteilung an den Verkäufer ausgeübt.

Artikel 119
Verlust des Rechts auf Vertragsbeendigung

1. Der Käufer verliert sein Recht auf Vertragsbeendigung nach diesem Abschnitt, wenn die Beendigung nicht innerhalb einer angemessenen Frist ab Entstehung des Rechts oder ab dem Zeitpunkt, zu dem der Käufer von der Nichterfüllung Kenntnis erlangt hat oder hätte erlangen müssen, je nachdem, welches Ereignis später eingetreten ist, mitgeteilt wird.

2. Absatz 1 gilt nicht, wenn

   (a) es sich bei dem Käufer um einen Verbraucher handelt oder

   (b) überhaupt keine Leistung angeboten wurde.

ABSCHNITT 6 PREISMINDERUNG

Artikel 120
Recht auf Preisminderung

1. Der Käufer, der eine nicht vertragsgemäße Leistung annimmt, kann den Preis mindern. Die Minderung bemisst sich nach dem Verhältnis, in dem der verminderte Wert der Leistung zur Zeit des Leistungsangebots zu dem Wert steht, den eine vertragsgemäße Leistung gehabt hätte.

2. Der Käufer, der nach Absatz 1 zur Minderung des Preises berechtigt ist und bereits einen höheren Betrag als den geminderten Preis gezahlt hat, kann die Differenz vom Verkäufer zurückverlangen.

3. Der Käufer, der den Preis mindert, kann für den dadurch ausgeglichenen Verlust nicht auch noch Schadensersatz verlangen; er behält aber das Recht, für jeden weiteren Verlust Schadensersatz zu verlangen.

ABSCHNITT 7 PRÜFUNGS- UND MITTEILUNGSPFLICHTEN BEI EINEM VERTRAG ZWISCHEN UNTERNEHMERN

Artikel 121
Prüfung der Waren bei einem Vertrag zwischen Unternehmern

1. Bei einem Vertrag zwischen Unternehmern wird vom Käufer erwartet, dass er die Waren innerhalb einer so kurzen Frist prüft oder prüfen lässt, wie es die Umstände erlauben, wobei diese Frist 14 Tage ab dem Zeitpunkt der Lieferung der Waren, der Bereitstellung der digitalen Inhalte oder der Erbringung verbundener Dienstleistungen nicht überschreiten darf.

2. Schließt der Vertrag die Beförderung der Waren ein, kann die Prüfung bis nach dem Eintreffen der Waren am Bestimmungsort aufgeschoben werden.

3. Werden die Waren vom Käufer umgeleitet oder weiterversandt, bevor der Käufer angemessene Gelegenheit zur Prüfung hatte, und war dem Verkäufer bei Vertragsschluss die Möglichkeit einer solchen Umleitung oder Weiterversendung bekannt oder hätte sie ihm bekannt sein müssen, kann die Prüfung bis nach dem Eintreffen der Waren an ihrem neuen Bestimmungsort aufgeschoben werden.

Artikel 122

Mitteilungspflicht bei nicht vertragsgemäß erbrachter Leistung im Falle von Kaufverträgen zwischen Unternehmern

1. Bei einem Vertrag zwischen Unternehmern kann sich der Käufer nur dann auf die Vertragswidrigkeit der Leistung berufen, wenn er dem Verkäufer innerhalb einer angemessenen Frist mitteilt, inwiefern die Leistung nicht vertragsgemäß erbracht wurde.

   Die Frist beginnt ab dem Zeitpunkt, zu dem die Waren geliefert worden sind oder der Käufer die Vertragswidrigkeit feststellt oder hätte feststellen müssen, je nachdem, welches Ereignis später eingetreten ist.

2. Der Käufer verliert das Recht, sich auf eine Vertragswidrigkeit zu berufen, wenn er dem Verkäufer die Vertragswidrigkeit nicht innerhalb von zwei Jahren mitteilt, nachdem ihm die Waren tatsächlich entsprechend dem Vertrag übergeben worden sind.

3. Haben die Parteien vereinbart, dass die Waren für einen bestimmten Zweck geeignet sein oder ihren gewöhnlichen Zweck über einen festgelegten Zeitraum erfüllen müssen, läuft die Frist für die Mitteilung nach Absatz 2 nicht vor Ablauf dieses vereinbarten Zeitraums ab.

4. Absatz 2 ist nicht auf Rechte oder Ansprüche Dritter gemäß Artikel 102 anwendbar.

5. Der Käufer muss dem Verkäufer nicht mitteilen, dass nicht alle Waren geliefert worden sind, wenn er Grund zu der Annahme hat, dass die ausstehenden Waren noch geliefert werden.

6. Der Verkäufer ist nicht berechtigt, sich auf diesen Artikel zu berufen, wenn die Vertragswidrigkeit auf Tatsachen beruht, die er kannte oder hätte kennen müssen und die er dem Käufer nicht offen gelegt hat.

Kapitel 12 Verpflichtungen des Käufers

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 123
Hauptverpflichtungen des Käufers

1. Der Käufer muss

   (a) den Preis zahlen,

   (b) die Waren oder die digitalen Inhalte annehmen und

   (c) Dokumente, die die Waren oder digitalen Inhalte vertreten oder diese betreffen, übernehmen, wenn dies vertraglich vorgesehen ist.

2. Absatz 1 Buchstabe a gilt nicht für Verträge über die Bereitstellung digitaler Inhalte, wenn die digitalen Inhalte nicht gegen Zahlung eines Preises bereitgestellt werden.

ABSCHNITT 2 ZAHLUNG DES PREISES

Artikel 124
Zahlungsweise

1. Die Zahlung erfolgt auf die in den Vertragsbestimmungen angegebene Weise oder, wenn nichts angegeben ist, auf jede Weise, die am Ort der Zahlung im allgemeinen Geschäftsverkehr für die Art des betreffenden Geschäfts üblich ist.

2. Nimmt ein Verkäufer einen Scheck, eine andere Zahlungsanweisung oder ein Zahlungsversprechen an, so wird vermutet, dass dies nur unter der Bedingung der Einlösung geschieht. Der Verkäufer kann die ursprüngliche Zahlungsverpflichtung vollstrecken, wenn die Anweisung oder das Versprechen nicht eingelöst wird.

3. Die ursprüngliche Zahlungsverpflichtung des Käufers erlischt, wenn der Verkäufer ein Zahlungsversprechen eines Dritten annimmt, mit dem der Verkäufer zuvor vereinbart hat, dass er das Versprechen des Dritten als Zahlungsweise annimmt.

4. Bei einem Vertrag zwischen einem Unternehmer und einem Verbraucher hat der Verbraucher nicht die mit einer bestimmten Zahlungsweise verbundenen Gebühren zu tragen, die die Kosten des Unternehmers für die Benutzung dieser Zahlungsweise übersteigen.

Artikel 125
Ort der Zahlung

1. Kann der Ort der Zahlung nicht anderweitig bestimmt werden, so ist Ort der Zahlung der Geschäftssitz des Verkäufers zum Zeitpunkt des Vertragsschlusses.

2. Hat der Verkäufer mehr als einen Geschäftssitz, ist der Geschäftssitz maßgebend, die die engste Beziehung zu der Zahlungsverpflichtung aufweist.

Artikel 126
Zeitpunkt der Zahlung

1. Die Zahlung des Preises ist bei Lieferung fällig.

2. Der Verkäufer kann eine vor Fälligkeit der Zahlung angebotene Zahlung ablehnen, wenn er ein berechtigtes Interesse an der Ablehnung hat.

Artikel 127
Zahlung durch einen Dritten

1. Der Käufer kann eine andere Person mit der Zahlung betrauen. Der Käufer, der eine andere Person mit der Zahlung betraut, bleibt für die Zahlung verantwortlich.

2. Der Verkäufer kann die Zahlung durch einen Dritten nicht ablehnen, wenn

   (a) der Dritte mit Zustimmung des Käufers handelt oder

   (b) der Dritte ein berechtigtes Interesse an der Zahlung hat und der Käufer nicht gezahlt hat oder offensichtlich ist, dass der Käufer zum Zeitpunkt der Fälligkeit nicht zahlen wird.

3. Die Zahlung durch einen Dritten gemäß Absatz 1 oder 2 befreit den Käufer von seiner Haftung gegenüber dem Verkäufer.

4. Nimmt der Verkäufer die Zahlung durch einen Dritten in einem Fall an, der nicht unter Absatz 1 oder 2 fällt, wird der Käufer von seiner Haftung gegenüber dem Verkäufer befreit, wobei der Verkäufer dem Käufer für jeden durch die Annahme verursachten Verlust haftet.

Artikel 128
Anrechnung der Zahlung

1. Hat der Käufer gegenüber dem Verkäufer mehrere Zahlungen zu leisten und reicht die geleistete Zahlung nicht für alle Zahlungen aus, so kann der Käufer dem Verkäufer zum Zeitpunkt der Zahlung mitteilen, welche Verpflichtung durch die Zahlung erfüllt werden soll.

2. Unterlässt der Käufer die Mitteilung nach Absatz 1, kann der Verkäufer die Zahlung auf eine der Verpflichtungen anrechnen; er teilt dies dem Käufer innerhalb einer angemessenen Frist mit.

3. Eine Anrechnung nach Absatz 2 ist unwirksam, wenn sie sich auf eine Verpflichtung bezieht, die noch nicht fällig oder bestritten ist.

4. Hat keine der Parteien eine wirksame Anrechnung vorgenommen, wird die Zahlung auf die Verpflichtung angerechnet, die eines der folgenden Kriterien in nachstehender Reihenfolge erfüllt:

   (a) die Verpflichtung, die fällig ist oder als erste fällig wird;

   (b) die Verpflichtung, für die der Verkäufer keine oder die geringste Sicherheit hat;

   (c) die Verpflichtung, die den Käufer am meisten belastet;

   (d) die Verpflichtung, die als erste entstanden ist.

   Findet keines dieser Kriterien Anwendung, wird die Zahlung anteilmäßig auf alle Verpflichtungen angerechnet.

5. Die Zahlung kann nach Absatz 2, 3 oder 4 nur dann auf eine verjährte und deshalb nicht vollstreckbare Verpflichtung angerechnet werden, wenn es keine andere Verpflichtung gibt, auf die die Zahlung nach diesen Absätzen angerechnet werden könnte.

6. Bei jedweder Verpflichtung wird die Zahlung durch den Käufer zuerst auf die Kosten, dann auf die Zinsen und schließlich auf die Hauptforderung angerechnet, es sei denn, der Verkäufer nimmt eine andere Anrechnung vor.

ABSCHNITT 3 ANNAHME DER LIEFERUNG

Artikel 129
Annahme der Lieferung

Der Käufer erfüllt seine Verpflichtung zur Annahme der Lieferung durch

a) Vornahme aller Handlungen, die erwartet werden können, um dem Verkäufer die Erfüllung der Lieferverpflichtung zu ermöglichen, und

b) Übernahme der Waren oder digitalen Inhalte oder der diese vertretenden Dokumente entsprechend den Anforderungen des Vertrages.

Artikel 130
Vorzeitige Lieferung und Lieferung einer falschen Menge

1. Liefert der Verkäufer die Waren oder digitalen Inhalte vor dem festgesetzten Liefertermin, muss der Käufer die Lieferung annehmen, es sei denn, der Käufer hat ein berechtigtes Interesse, die Annahme zu verweigern.

2. Liefert der Verkäufer eine geringere als die im Vertrag vereinbarte Menge, muss der Käufer die Lieferung annehmen, es sei denn, der Käufer hat ein berechtigtes Interesse, die Annahme zu verweigern.

3. Liefert der Verkäufer eine größere als die im Vertrag vereinbarte Menge, kann der Käufer die zuviel gelieferte Menge behalten oder zurückweisen.

4. Behält der Käufer die zuviel gelieferte Menge, so wird diese als vertragliche Lieferung behandelt und muss nach dem vertraglich vereinbarten Preis bezahlt werden.

5. Absatz 4 ist nicht auf einen Verbraucherkaufvertrag anzuwenden, wenn der Käufer Grund zu der Annahme hat, dass der Verkäufer vorsätzlich und ohne Irrtum eine größere Menge in dem Wissen geliefert hat, dass diese Menge nicht bestellt worden ist.

6. Dieser Artikel gilt nicht für Verträge über die Bereitstellung digitaler Inhalte, wenn die digitalen Inhalte nicht gegen Zahlung eines Preises bereitgestellt werden.

Kapitel 13 Abhilfen des Verkäufers

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 131
Übersicht über die Abhilfen des Verkäufers

1. Hat der Käufer eine Verpflichtung nicht erfüllt, kann der Verkäufer

   (a) die Erfüllung gemäß Abschnitt 2 verlangen,

   (b) seine eigene Leistung gemäß Abschnitt 3 zurückhalten,

   (c) gemäß Abschnitt 4 den Vertrag beenden und

   (d) gemäß Kapitel 16 Zinsen auf den Preis oder Schadensersatz verlangen.

2. Ist die Nichterfüllung des Käufers entschuldigt, kann der Verkäufer von den in Absatz 1 genannten Abhilfen Gebrauch machen mit Ausnahme der Forderung nach Erfüllung und Schadensersatz.

3. Der Verkäufer kann von den in Absatz 1 genannten Abhilfen nicht Gebrauch machen, soweit er die Nichterfüllung des Käufers verursacht hat.

4. Abhilfen, die miteinander vereinbar sind, können nebeneinander geltend gemacht werden.

ABSCHNITT 2 FORDERUNG NACH ERFÜLLUNG

Artikel 132
Forderung nach Erfüllung der Verpflichtungen des Käufers

1. Der Verkäufer ist berechtigt, die Zahlung des Preises, wenn diese fällig ist, sowie die Erfüllung aller sonstigen Verpflichtungen des Käufers zu verlangen.

2. Hat der Käufer die Waren oder digitalen Inhalte noch nicht übernommen und ist er offensichtlich nicht bereit, die Leistung entgegenzunehmen, kann der Verkäufer vom Käufer gleichwohl verlangen, die Lieferung anzunehmen, und die Zahlung des Preises verlangen, es sei denn, der Verkäufer hätte ohne nennenswerten finanziellen oder sonstigen Aufwand ein angemessenes Deckungsgeschäft abschließen können.

ABSCHNITT 3 ZURÜCKHALTUNG DER LEISTUNG DURCH DEN VERKÄUFER

Artikel 133
Recht auf Zurückhaltung der Leistung

1. Ein Verkäufer, der gleichzeitig mit oder nach der Leistung des Käufers erfüllen muss, hat das Recht, seine Leistung zurückzuhalten, bis der Käufer seine Leistung angeboten oder erbracht hat.

2. Ein Verkäufer, der vor der Leistung des Käufers erfüllen muss und Grund zu der Annahme hat, dass der Käufer nicht erfüllen wird, wenn dessen Leistung fällig wird, kann die eigene Leistung so lange zurückhalten, wie diese Annahme fortbesteht. Das Recht auf Zurückhaltung der Leistung erlischt aber, wenn der Käufer eine angemessene Gewähr für die ordnungsgemäße Leistung bietet oder eine angemessene Sicherheit leistet.

3. Die Leistung, die nach diesem Artikel zurückgehalten werden kann, umfasst die ganze oder einen Teil der Leistung, soweit dies durch die Nichterfüllung gerechtfertigt ist. Sind die Verpflichtungen des Käufers in selbstständigen Teilleistungen zu erfüllen oder auf andere Weise teilbar, kann der Verkäufer seine Leistung nur hinsichtlich der nichterfüllten Teilleistung des Käufers zurückhalten, es sei denn, die Nichterfüllung durch den Käufer rechtfertigt die Zurückhaltung der gesamten Leistung des Verkäufers.

ABSCHNITT 4 BEENDIGUNG DES VERTRAGS

Artikel 134
Beendigung wegen wesentlicher Nichterfüllung

Der Verkäufer kann im Sinne von Artikel 8 den Vertrag beenden, wenn die Nichterfüllung durch den Käufer im Rahmen des Vertrags wesentlich im Sinne von Artikel 87 Absatz 2 ist.

Artikel 135
Beendigung wegen Verspätung nach Setzen einer Nachfrist für die Erfüllung

1. Der Verkäufer kann im Fall einer verspäteten Erfüllung, die nicht als solche als wesentlich anzusehen ist, den Vertrag beenden, wenn er dem Käufer in einer Mitteilung eine angemessene Nachfrist zur Erfüllung setzt und der Käufer nicht innerhalb dieser Frist erfüllt.

2. Die Frist gilt als angemessen, wenn der Käufer ihr nicht unverzüglich widerspricht. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher darf die Nachfrist nicht vor Ablauf von 30 Tagen gemäß Artikel 167 Absatz 2 enden.

3. Bestimmt die Mitteilung, dass ohne Weiteres Beendigung eintreten soll, wenn der Käufer nicht innerhalb der in der Mitteilung gesetzten Frist erfüllt, wird die Beendigung nach Ablauf dieser Frist ohne weitere Mitteilung wirksam.

4. In einem Verbraucherkaufvertrag dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder seine Wirkungen abändern.

Artikel 136
Beendigung wegen voraussichtlicher Nichterfüllung

Der Verkäufer kann den Vertrag beenden, bevor die Erfüllung fällig wird, wenn der Käufer erklärt hat oder anderweitig offensichtlich ist, dass Nichterfüllung eintreten wird, und wenn die Nichterfüllung wesentlich wäre.

Artikel 137
Umfang des Beendigungsrechts

1. Sind die vertraglichen Verpflichtungen des Käufers in selbstständigen Teilleistungen zu erfüllen oder auf andere Weise teilbar, so kann der Verkäufer, wenn für einen Teil, dem ein Preis zugeordnet werden kann, ein Beendigungsgrund nach diesem Abschnitt besteht, den Vertrag nur in Bezug auf diesen Teil beenden.

2. Absatz 1 findet keine Anwendung, wenn in Bezug auf den Vertrag insgesamt eine wesentliche Nichterfüllung vorliegt.

3. Sind die vertraglichen Verpflichtungen des Käufers nicht in selbstständigen Teilleistungen zu erfüllen, kann der Verkäufer den Vertrag nur dann beenden, wenn in Bezug auf den Vertrag insgesamt eine wesentliche Nichterfüllung vorliegt.

Artikel 138
Mitteilung über die Vertragsbeendigung

Das Recht auf Vertragsbeendigung nach diesem Abschnitt wird durch Mitteilung an den Käufer ausgeübt.

Artikel 139
Verlust des Rechts auf Vertragsbeendigung

1. Wurde die Leistung zu spät angeboten oder ist die angebotene Leistung aus anderem Grund nicht vertragsgemäß, verliert der Verkäufer sein Recht auf Vertragsbeendigung nach diesem Abschnitt, es sei denn, er teilt die Beendigung des Vertrags innerhalb einer angemessenen Frist mit, nachdem er von dem Angebot der Leistung oder ihrer Vertragswidrigkeit Kenntnis erlangt hat oder hätte erlangen müssen.

2. Der Verkäufer verliert sein Recht auf Vertragsbeendigung durch Mitteilung nach Artikel 136, wenn er die Vertragsbeendigung nicht innerhalb einer angemessenen Frist ab Entstehung des Rechts mitteilt.

3. Hat der Käufer den Preis nicht gezahlt oder liegt seinerseits eine sonstige wesentliche Nichterfüllung vor, behält der Verkäufer sein Recht auf Vertragsbeendigung.

Kapitel 14 Gefahrübergang

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 140
Wirkung des Gefahrübergangs

Untergang oder Beschädigung der Waren oder digitalen Inhalte nach Übergang der Gefahr auf den Käufer befreien den Käufer nicht von der Verpflichtung, den Preis zu zahlen, es sei denn, der Untergang oder die Beschädigung beruht auf einer Handlung oder Unterlassung des Verkäufers.

Artikel 141
Zuordnung der Waren oder digitalen Inhalte zum Vertrag

Die Gefahr geht erst dann auf den Käufer über, wenn die Waren oder digitalen Inhalte entweder durch die ursprüngliche Vereinbarung, durch Mitteilung an den Käufer oder auf andere Weise eindeutig als diejenigen identifiziert sind, die nach dem Vertrag geliefert werden müssen.

ABSCHNITT 2 GEFAHRÜBERGANG BEI EINEM VERBRAUCHERKAUFVERTRAG

Artikel 142
Gefahrübergang bei einem Verbraucherkaufvertrag

1. Bei einem Verbraucherkaufvertrag geht die Gefahr zu dem Zeitpunkt über, zu dem der Verbraucher oder ein von ihm bezeichneter Dritter mit Ausnahme des Beförderers Besitz an den Waren oder dem materiellen Datenträger, auf dem die digitalen Inhalte bereitgestellt werden, erlangt hat.

2. Bei einem Vertrag über die Bereitstellung digitaler Inhalte ohne materiellen Datenträger geht die Gefahr zu dem Zeitpunkt über, zu dem der Verbraucher oder ein von ihm hierzu bezeichneter Dritter die Kontrolle über die digitalen Inhalte erlangt hat.

3. Ausgenommen bei Fernabsatzverträgen und bei außerhalb von Geschäftsräumen geschlossenen Verträgen finden die Absätze 1 und 2 keine Anwendung, wenn der Verbraucher seine Verpflichtung zur Übernahme der Waren oder digitalen Inhalte nicht erfüllt und die Nichterfüllung nicht gemäß Artikel 88 entschuldigt ist. In diesem Fall geht die Gefahr zu dem Zeitpunkt über, zu dem der Verbraucher oder der von ihm bezeichnete Dritte Besitz an den Waren oder Kontrolle über die digitalen Inhalte erlangt hätte, wenn die Verpflichtung zur Übernahme der Waren oder digitalen Inhalte erfüllt worden wäre.

4. Hat der Verbraucher die Beförderung der Waren oder der auf einem materiellen Datenträger bereitgestellten digitalen Inhalte selbst veranlasst, ohne dass der Unternehmer diese Möglichkeit angeboten hat, geht die Gefahr zu dem Zeitpunkt über, zu dem die Waren oder die auf einem materiellen Datenträger bereitgestellten digitalen Inhalte dem Beförderer übergeben werden; die Rechte des Verbrauchers gegen den Beförderer bleiben hiervon unberührt.

5. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

ABSCHNITT 3 GEFAHRÜBERGANG BEI EINEM VERTRAG ZWISCHEN UNTERNEHMERN

Artikel 143
Zeitpunkt des Gefahrübergangs

1. Bei einem Vertrag zwischen Unternehmern geht die Gefahr zu dem Zeitpunkt über, zu dem der Käufer die Waren oder digitalen Inhalte oder die diese vertretenden Dokumente angenommen hat.

2. Absatz 1 gilt vorbehaltlich der Artikel 144, 145 und 146.

Artikel 144
Dem Käufer zu seiner Verfügung bereitgestellte Waren

1. Sind die Waren oder digitalen Inhalte dem Käufer zu seiner Verfügung bereitgestellt worden und ist dem Käufer dies bekannt, geht die Gefahr zu dem Zeitpunkt auf den Käufer über, zu dem die Waren oder digitalen Inhalte hätten übernommen werden müssen, es sei denn, der Käufer war berechtigt, die Annahme der Lieferung gemäß Artikel 113 zurückzuhalten.

2. Sind die Waren oder digitalen Inhalte dem Käufer an einem anderen Ort als einem Geschäftssitz des Verkäufers zu seiner Verfügung bereitgestellt worden, geht die Gefahr zu dem Zeitpunkt über, zu dem die Lieferung fällig ist und der Käufer Kenntnis davon erhält, dass ihm die Waren oder digitalen Inhalte an diesem Ort zu seiner Verfügung bereitgestellt worden sind.

Artikel 145
Beförderung der Waren

1. Dieser Artikel gilt für Kaufverträge, die eine Beförderung der Waren einschließen.

2. Ist der Verkäufer nicht verpflichtet, die Waren an einem bestimmten Ort zu übergeben, geht die Gefahr zu dem Zeitpunkt auf den Käufer über, zu dem die Waren vertragsgemäß dem ersten Beförderer zur Versendung an den Käufer übergeben worden sind.

3. Hat der Verkäufer dem Beförderer die Waren an einem bestimmten Ort zu übergeben, geht die Gefahr erst zu dem Zeitpunkt auf den Käufer über, zu dem die Waren dem Beförderer an diesem Ort übergeben worden sind.

4. Der Umstand, dass der Verkäufer befugt ist, Dokumente, die zur Verfügung über die Waren berechtigen, zurückzuhalten, hat keine Auswirkungen auf den Gefahrübergang.

Artikel 146
Während der Beförderung verkaufte Waren

1. Dieser Artikel gilt für Kaufverträge, die während der Beförderung verkaufte Waren einschließen.

2. Die Gefahr geht auf den Käufer über, sobald die Waren dem ersten Beförderer übergeben worden sind. Wenn es sich jedoch aus den Umständen so ergibt, geht die Gefahr zum Zeitpunkt des Vertragsschlusses auf den Käufer über.

3. Wenn der Verkäufer bei Vertragsschluss wusste oder hätte wissen müssen, dass die Waren untergegangen oder beschädigt sind, und er dies dem Käufer nicht offen gelegt hat, geht der Untergang oder die Beschädigung zu Lasten des Verkäufers.

Teil V Verpflichtungen und Abhilfen der Parteien bei einem Vertrag über verbundene Dienstleistungen

Kapitel 15 Verpflichtungen und Abhilfen der Parteien

ABSCHNITT 1 ANWENDUNG BESTIMMTER ALLGEMEINER VORSCHRIFTEN FÜR KAUFVERTRÄGE

Artikel 147
Anwendung bestimmter allgemeiner Vorschriften für Kaufverträge

1. Auf diesen Teil finden die Vorschriften von Kapitel 9 Anwendung.

2. Mit der Beendigung eines Kaufvertrags oder eines Vertrags über die Bereitstellung digitaler Inhalte endet auch der Vertrag über verbundene Dienstleistungen.

ABSCHNITT 2 VERPFLICHTUNGEN DES DIENSTLEISTERS

Artikel 148
Verpflichtung zur Herbeiführung eines Erfolgs sowie zu sorgfältigem und fachkundigem Vorgehen

1. Der Dienstleister ist verpflichtet, jedweden vertraglich geschuldeten Erfolg herbeizuführen.

2. In Ermangelung einer ausdrücklichen oder stillschweigenden vertraglichen Verpflichtung zur Herbeiführung eines bestimmten Erfolgs hat der Dienstleister die verbundene Dienstleistung mit der Sorgfalt und Fachkunde zu erbringen, die ein vernünftig handelnder Dienstleister in Übereinstimmung mit etwaigen für die betreffende verbundene Dienstleistung geltenden gesetzlichen oder sonstigen verbindlichen Rechtsvorschriften anwenden würde.

3. Bei der Bestimmung der vom Dienstleister vernünftigerweise zu erwartenden Sorgfalt und Fachkunde sind unter anderem zu berücksichtigen:

   (a) Art, Ausmaß, Häufigkeit und Vorhersehbarkeit der mit der Erbringung der verbundenen Dienstleistung verbundenen Gefahren für den Verbraucher,

   (b) im Schadensfall die Kosten für Vorkehrungen, mit denen sich der eingetretene oder ein ähnlicher Schaden hätte verhindern lassen, und

   (c) die für die Erbringung der verbundenen Dienstleistung zur Verfügung stehende Zeit.

4. Beinhaltet die in einem Vertrag zwischen einem Unternehmer und einem Verbraucher vereinbarte verbundene Dienstleistung die Montage der Ware, muss die Montage gemäß Artikel 101 dergestalt erfolgen, das die montierte Ware vertragsgemäß ist.

5. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung des Absatzes 2 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 149
Verpflichtung zur Schadensverhütung

Der Dienstleister muss angemessene Vorkehrungen treffen, damit die Waren oder digitalen Inhalte nicht beschädigt werden und damit bei der Erbringung der verbundenen Dienstleistung oder als Folge davon keine Körperverletzung und kein sonstiger Verlust oder Schaden entstehen.

Artikel 150
Erfüllung durch einen Dritten

1. Der Dienstleister kann eine andere Person mit der Erfüllung betrauen, sofern keine persönliche Erfüllung durch den Dienstleister erforderlich ist.

2. Der Dienstleister, der eine andere Person mit der Erfüllung betraut, bleibt für die Erfüllung verantwortlich.

3. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung des Absatzes 2 nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Artikel 151
Verpflichtung zur Rechnungsstellung

Ist die verbundene Dienstleistung gesondert zu vergüten und besteht der Preis der verbundenen Dienstleistung nicht in einem bei Vertragsschluss vereinbarten Pauschalbetrag, muss der Dienstleister dem Kunden eine Rechnung stellen, aus der klar und nachvollziehbar hervorgeht, wie der Rechnungsbetrag zustande kam.

Artikel 152
Verpflichtung zur Ankündigung unvorhergesehener oder unverhältnismäßig hoher Kosten

1. Der Dienstleister muss den Kunden benachrichtigen und dessen Zustimmung zur weiteren Leistungserbringung einholen, wenn

   (a) die Kosten der verbundenen Dienstleistung die vom ihm bis dahin dem Kunden genannten Kosten übersteigen oder

(b) die verbundene Dienstleistung nach ihrer Erbringung den Wert der Waren oder digitalen Inhalte übersteigen würde, soweit der Dienstleister dies absehen kann.

2. Versäumt es der Dienstleister, gemäß Absatz 1 die Zustimmung des Kunden einzuholen, darf er keinen Preis in Rechnung stellen, der die bis dahin angegebenen Kosten beziehungsweise den Wert der Waren oder digitalen Inhalte nach Erbringung der verbundenen Dienstleistung übersteigt.

ABSCHNITT 3 VERPFLICHTUNGEN DES KUNDEN

Artikel 153
Zahlung des Preises

1. Der Kunde hat den für die verbundene Dienstleistung nach dem Vertrag geschuldeten Preis zu entrichten.

2. Die Zahlung wird fällig, nachdem die verbundene Dienstleistung vollständig erbracht ist und der Kunde über den Gegenstand der verbundenen Dienstleistung verfügen kann.

Artikel 154
Zugangsverschaffung

Muss der Dienstleister, um die verbundene Dienstleistung erbringen zu können, Zugang zu den Räumlichkeiten des Kunden erhalten, ist der Kunde verpflichtet, ihm diesen Zugang zu angemessenen Zeiten zu verschaffen.

ABSCHNITT 4 ABHILFEN

Artikel 155
Abhilfen des Kunden

1. Bei Nichterfüllung einer dem Dienstleister obliegenden Verpflichtung verfügt der Kunde über dieselben Abhilfen mit den entsprechenden nachstehend dargelegten Anpassungen, die dem Käufer gemäß Kapitel 11 zustehen, das heißt, der Kunde kann

(a) die Erfüllung der betreffenden Verpflichtung verlangen,

(b) seine eigene Erfüllung zurückhalten,

(c) den Vertrag beenden,

(d) den Preis mindern und

(e) Schadensersatz verlangen.

2. Unbeschadet des Absatzes 3 gelten die dem Kunden zustehenden Abhilfen vorbehaltlich des Rechts des Dienstleisters auf Heilung, gleich, ob es sich bei dem Kunden um einen Verbraucher handelt oder nicht.

3. Bei unsachgemäßer Montage oder Installierung im Sinne von Artikel 101 im Rahmen eines Verbraucherkaufvertrags unterliegen die Abhilfen des Verbrauchers nicht dem Vorbehalt der Heilung durch den Dienstleister.

4. Ist der Kunde ein Verbraucher, kann er bei vertragswidriger Erbringung einer verbundenen Dienstleistung den Vertrag beenden, es sei denn, die Vertragswidrigkeit ist unerheblich.

5. Kapitel 11 gilt mit folgenden Anpassungen:

   (a) Bei Verträgen zwischen einem Unternehmer und einem Verbraucher darf die angemessene Frist gemäß Artikel 109 Absatz 5, während der dem Dienstleister ein Recht auf Heilung zusteht, 30 Tage nicht überschreiten.

   (b) Wird einer nicht vertragsgemäßen Erfüllung abgeholfen, finden die Artikel 111 und 112 keine Anwendung.

   (c) Statt Artikel 122 gilt Artikel 156.

Artikel 156
Mitteilungspflicht bei Vertragswidrigkeit im Falle von Verträgen über verbundene Dienstleistungen zwischen Unternehmern

1. Bei einem Vertrag über verbundene Dienstleistungen zwischen Unternehmern kann sich der Kunde nur dann auf die Vertragswidrigkeit berufen, wenn er dem Dienstleister innerhalb einer angemessenen Frist mitteilt, inwieweit Vertragswidrigkeit vorliegt.

   Die Frist beginnt ab dem Zeitpunkt, zu dem die verbundene Dienstleistung vollständig erbracht wurde oder der Kunde die Vertragswidrigkeit feststellt oder hätte feststellen müssen, je nachdem, welches Ereignis später eingetreten ist.

2. Der Dienstleister ist nicht berechtigt, sich auf diesen Artikel zu berufen, wenn die Vertragswidrigkeit auf Tatsachen beruht, die er kannte oder hätte kennen müssen und die er dem Kunden nicht offen gelegt hat.

Artikel 157
Abhilfen des Dienstleisters

1. Bei Nichterfüllung durch den Kunden verfügt der Dienstleister über dieselben Abhilfen mit den entsprechenden in Absatz 2 dargelegten Anpassungen, die dem Verkäufer gemäß Kapitel 13 zustehen, das heißt, der Dienstleister kann

   (a) Erfüllung verlangen,

   (b) seine eigene Erfüllung zurückhalten,

(c) den Vertrag beenden und

(d) Zinsen auf den Preis oder Schadensersatz verlangen.

2. Kapitel 13 gilt mit den erforderlichen Anpassungen. Insbesondere gilt Artikel 158 statt Artikel 132 Absatz 2.

Artikel 158
Recht des Kunden auf Ablehnung der Leistung

1. Der Kunde kann dem Dienstleister jederzeit mitteilen, dass die Erbringung oder die weitere Erbringung der verbundenen Dienstleistung nicht länger benötigt wird.

2. Erfolgt eine Mitteilung gemäß Absatz 1,

(a) hat der Dienstleister nicht länger das Recht noch die Verpflichtung, die verbundene Dienstleistung zu erbringen, und

(b) ist der Kunde, sofern kein Grund für eine Beendigung des Vertrags aufgrund einer anderen Vorschrift vorliegt, zur Zahlung des Preises verpflichtet abzüglich der Einsparungen, die der Dienstleister infolge der Nichterfüllung beziehungsweise unvollständigen Erfüllung gemacht hat oder hätte machen können.

3. Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Teil VI Schadensersatz und Zinsen

Kapitel 16 Schadensersatz und Zinsen

ABSCHNITT 1 SCHADENSERSATZ

Artikel 159
Recht auf Schadensersatz

1. Der Gläubiger ist zum Schadensersatz für den ihm durch Nichterfüllung einer Verpflichtung des Schuldners entstandenen Verlust berechtigt, es sei denn, die Nichterfüllung ist entschuldigt.

2. Der Verlust, für den Schadensersatz verlangt werden kann, schließt künftige Verluste mit ein, mit deren Eintritt der Schuldner rechnen konnte.

Artikel 160
Bemessungsgrundlage

Grundlage für die Bemessung des Schadensersatzes für den infolge Nichterfüllung einer Verpflichtung entstandenen Verlust bildet der Betrag, der den Gläubiger in die Lage versetzt, in der er sich befunden hätte, wenn die Verpflichtung ordnungsgemäß erfüllt worden wäre, oder wenn dies nicht möglich ist, der Betrag, der den Gläubiger so weit wie möglich in diese Lage versetzt. Der Schadensersatz umfasst sowohl den vom Gläubiger erlittenen Verlust als auch den ihm entgangenen Gewinn.

Artikel 161
Voraussehbarkeit eines Verlusts

Der Schuldner haftet nur für den Verlust, den er zu dem Zeitpunkt, als der Vertrag geschlossen wurde, als Folge der Nichterfüllung vorausgesehen hat oder hätte voraussehen können.

Artikel 162
Dem Gläubiger zurechenbarer Verlust

Der Schuldner haftet nicht für den vom Gläubiger erlittenen Verlust, soweit der Gläubiger zu der Nichterfüllung oder deren Folgen beigetragen hat.

Artikel 163
Minderung des Verlustes

1. Der Schuldner haftet nicht für den vom Gläubiger erlittenen Verlust, soweit der Gläubiger den Verlust durch angemessene Maßnahmen hätte mindern können.

2. Der Gläubiger hat Anspruch auf Ersatz aller angemessenen Aufwendungen, die ihm bei dem Versuch der Minderung des Verlusts entstanden sind.

Artikel 164
Deckungsgeschäft

Hat der Gläubiger einen Vertrag ganz oder teilweise beendet und hat er innerhalb einer angemessenen Frist und in angemessener Weise ein Deckungsgeschäft vorgenommen, so kann er, soweit er zum Schadensersatz berechtigt ist, die Differenz zwischen dem Betrag, der aufgrund des beendeten Vertrags zu zahlen gewesen wäre, und dem für das Deckungsgeschäft zu zahlenden Betrag sowie Ersatz jedes weiteren Verlusts verlangen.

Artikel 165
Marktpreis

Hat der Gläubiger einen Vertrag ganz oder teilweise beendet, ohne ein Deckungsgeschäft vorzunehmen, so kann er, soweit er zum Schadensersatz berechtigt ist und es einen Marktpreis für die Leistung gibt, die Differenz zwischen dem im Vertrag vereinbarten Preis und dem Marktpreis zum Zeitpunkt der Vertragsbeendigung sowie Ersatz jedes weiteren Verlusts verlangen.

ABSCHNITT 2 VERZUGSZINSEN: ALLGEMEINE BESTIMMUNGEN

Artikel 166
Verzugszinsen

1. Erfolgt die Zahlung einer Geldsumme verspätet, hat der Gläubiger vom Zeitpunkt der Fälligkeit bis zum Zeitpunkt der Zahlung, ohne dass es einer vorherigen Mitteilung bedarf, Anspruch auf Verzugszinsen für diesen Betrag in Höhe des in Absatz 2 angegebenen Zinssatzes.

2. Für Verzugszinsen gilt folgender Zinssatz:

   (a) Hat der Gläubiger seinen gewöhnlichen Aufenthalt in einem Mitgliedstaat, dessen Währung der Euro ist, oder in einem Drittstaat, gilt der Zinssatz, den die Europäische Zentralbank auf ihr letztes vor dem ersten Kalendertag des betreffenden Halbjahrs durchgeführtes Hauptrefinanzierungsgeschäft angewandt hat, oder der marginale Zinssatz, der sich aus Tenderverfahren mit variablem Zinssatz für die jüngsten Hauptrefinanzierungsgeschäfte der Europäischen Zentralbank ergibt, zuzüglich zwei Prozentpunkten.

   (b) Hat der Gläubiger seinen gewöhnlichen Aufenthalt in einem Mitgliedstaat, dessen Währung nicht der Euro ist, gilt der entsprechende Zinssatz der Zentralbank dieses Mitgliedstaats, zuzüglich zwei Prozentpunkten.

3. Der Gläubiger kann Schadensersatz für alle weiteren Verluste verlangen.

Artikel 167
Zinsen im Falle eines im Verzug befindlichen Verbrauchers

1. Ist der Schuldner ein Verbraucher, werden Verzugszinsen zu dem in Artikel 166 genannten Satz nur dann fällig, wenn die Nichterfüllung nicht entschuldig ist.

2. Die Verzinsung beginnt erst nach Ablauf von 30 Tagen, nachdem der Gläubiger den Schuldner in einer Mitteilung auf die Pflicht zur Zahlung von Zinsen und deren Höhe hingewiesen hat. Die Mitteilung kann erfolgen, bevor die Zahlung fällig wird.

3. Eine Vertragsklausel, die einen höheren Zinssatz vorsieht als in Artikel 166 angegeben oder eine frühere Entstehung als in Absatz 2 dieses Artikels genannt, ist nicht verbindlich, soweit eine solche Klausel unfair im Sinne von Artikel 83 wäre.

4. Verzugszinsen dürfen nicht der Hauptforderung zugeschlagen werden, um Zinsen zu erzeugen.

5. Die Parteien dürfen die Anwendung dieses Artikels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

ABSCHNITT 3 ZAHLUNGSVERZUG DURCH UNTERNEHMER

Artikel 168
Zinssatz und Entstehung

1. Verzögert ein Unternehmer die Zahlung eines vertraglich vereinbarten Preises für die Lieferung von Waren, die Bereitstellung digitaler Inhalte oder die Erbringung verbundener Dienstleistungen, ohne im Sinne von Artikel 88 entschuldigt zu sein, fallen Zinsen in Höhe des in Absatz 5 geregelten Zinssatzes an.

2. Die Verzinsung zu dem in Absatz 5 genannten Zinssatz beginnt mit dem Tag, der auf den vertraglich festgelegten Zahlungstermin oder das vertraglich festgelegte Ende der Zahlungsfrist folgt. Ist ein solcher Termin oder eine solche Frist nicht bestimmt, beginnt die Verzinsung

   (a) 30 Tage nach Eingang der Rechnung oder einer gleichwertigen Zahlungsaufforderung beim Schuldner oder

   (b) 30 Tage nach Empfang der Waren, digitalen Inhalte oder verbundenen Dienstleistungen, wenn der unter Buchstabe a genannte Zeitpunkt zeitlich davor liegt oder nicht eindeutig ist oder wenn nicht sicher ist, ob der Schuldner eine Rechnung oder eine gleichwertige Zahlungsaufforderung erhalten hat.

3. Ist ein Abnahme- oder Überprüfungsverfahren vorgesehen, durch das die Vertragsmäßigkeit der Waren, digitalen Inhalte oder verbundenen Dienstleistungen festgestellt werden soll, beginnt die in Absatz 2 Buchstabe b genannte Frist von 30 Tagen mit dem Tag der Abnahme oder dem Tag, an dem die Überprüfung abgeschlossen ist. Die Überprüfung darf sich über höchstens 30 Tage ab dem Zeitpunkt der Lieferung der Waren, der Bereitstellung der digitalen Inhalte oder der Erbringung der verbundenen Dienstleistungen erstrecken, es sei denn, die Parteien

haben ausdrücklich etwas anderes vereinbart und diese Vereinbarung ist nicht unfair im Sinne von Artikel 170.

4. Die Zahlungsfrist gemäß Absatz 2 darf 60 Tage nicht überschreiten, es sei denn, die Parteien haben ausdrücklich etwas anderes vereinbart und diese Vereinbarung ist nicht unfair im Sinne von Artikel 170.

5. Für Verzugszinsen gilt folgender Zinssatz:

   (a) Hat der Gläubiger seinen gewöhnlichen Aufenthalt in einem Mitgliedstaat, dessen Währung der Euro ist, oder in einem Drittstaat, gilt der Zinssatz, den die Europäische Zentralbank auf ihr letztes vor dem ersten Kalendertag des betreffenden Halbjahrs durchgeführtes Hauptrefinanzierungsgeschäft angewandt hat, oder der marginale Zinssatz, der sich aus Tenderverfahren mit variablem Zinssatz für die jüngsten Hauptrefinanzierungsgeschäfte der Europäischen Zentralbank ergibt, zuzüglich acht Prozentpunkten.

   (b) Hat der Gläubiger seinen gewöhnlichen Aufenthalt in einem Mitgliedstaat, dessen Währung nicht der Euro ist, gilt der entsprechende Zinssatz der Zentralbank dieses Mitgliedstaats, zuzüglich acht Prozentpunkten.

6. Der Gläubiger kann Schadensersatz für alle weiteren Verluste verlangen.

Artikel 169
Entschädigung für Beitreibungskosten

1. Fallen gemäß Artikel 168 Verzugszinsen an, hat der Gläubiger als Entschädigung für die Beitreibungskosten gegenüber dem Schuldner einen Anspruch auf Zahlung eines Pauschalbetrags von mindestens 40 EUR oder des entsprechenden Betrags in der Währung, in der die Zahlung des Vertragspreises zu erfolgen hat.

2. Der Gläubiger hat gegenüber dem Schuldner einen Anspruch auf angemessenen Ersatz etwaiger durch den Zahlungsverzug des Schuldners bedingter Beitreibungskosten, die den Pauschalbetrag gemäß Absatz 1 überschreiten.

Artikel 170
Unfaire Vertragsbestimmungen im Zusammenhang mit Verzugszinsen

1. Eine den Zahlungstermin oder die Zahlungsfrist, den für Verzugszinsen geltenden Zinssatz oder die Entschädigung für Beitreibungskosten betreffende Vertragsbestimmung ist nicht bindend, soweit sie unfair ist. Eine Vertragsbestimmung ist unfair, wenn sie unter Berücksichtigung des gesamten Sachverhalts einschließlich der Art der Waren, digitalen Inhalte oder der verbundenen Dienstleistungen unter Verstoß gegen das Gebot von Treu und Glauben und des redlichen Geschäftsverkehrs gröblich von der guten Handelspraxis abweicht.

2. Für die Zwecke von Absatz 1 gilt eine Vertragsbestimmung, die eine für den Gläubiger in Bezug auf den Zahlungstermin, die Zahlungsfrist oder den Zinssatz weniger günstige Regelung enthält als die in Artikel 167 oder 168, oder die eine

niedrigere als in Artikel 169 genannte Entschädigung für Beitreibungskosten vorsieht, als unfair.

3. Eine Vertragsbestimmung, mit der Verzugszinsen oder eine Entschädigung für Beitreibungskosten ausgeschlossen werden, ist per se unfair.

Artikel 171
Zwingender Charakter der Vorschriften

Die Parteien dürfen die Anwendung dieses Abschnitts weder ausschließen noch davon abweichen noch dessen Wirkungen abändern.

Teil VII Rückabwicklung

Kapitel 17 Rückabwicklung

Artikel 172
Rückabwicklung bei Anfechtung oder Beendigung des Vertrags

1. Bei Anfechtung oder Beendigung des Vertrags durch eine Partei ist jede Partei verpflichtet, was sie („Empfänger“) von der anderen Partei erlangt hat, zurückzugeben.

2. Die Verpflichtung zur Rückgabe des Erlangten erstreckt sich auf alle daraus gezogenen Sach- und Rechtsfrüchte.

3. Bei Beendigung eines Vertrags, der eine Leistung in Raten oder Teilen vorsieht, brauchen bereits empfangene Raten und Teilleistungen nicht zurückgegeben werden, wenn beide Seiten ihre Verpflichtungen erfüllt haben oder wenn der Preis für bereits erbrachte Leistungen gemäß Artikel 8 Absatz 2 weiterhin zahlbar bleibt, es sei denn, dass aufgrund der Art des Vertrags eine Teilleistung für eine der Parteien keinen Wert besäße.

Artikel 173
Zahlung des Geldwerts

1. Kann das Erlangte einschließlich etwaiger Früchte nicht zurückgegeben werden oder handelt es sich um digitale Inhalte, gleich, ob sie auf einem materiellen Datenträger bereitgestellt wurden oder nicht, muss der Empfänger den Geldwert erstatten. Wäre die Rückgabe zwar möglich, aber mit unverhältnismäßig hohem finanziellem oder sonstigem Aufwand verbunden, so kann sich der Empfänger für die Zahlung des Geldwerts entscheiden, soweit dadurch nicht die Eigentumsrechte der anderen Partei verletzt werden.

2. Der Geldwert einer Ware ist der Wert, den sie zum Zeitpunkt der Fälligkeit der Zahlung des Geldwerts gehabt hätte, wenn sie beim Empfänger verblieben wäre, ohne bis dahin untergegangen oder beschädigt worden zu sein.

3. Wird ein Vertrag über eine verbundene Dienstleistung vom Kunden angefochten oder beendet, nachdem die verbundene Dienstleistung ganz oder teilweise erbracht wurde, ist der Geldwert dessen, was der Kunde erlangt hat, der Betrag, den der Kunde durch den Erhalt der verbundenen Dienstleistung gespart hat.

4. Bei digitalen Inhalten ist der Geldwert des Erlangten der Betrag, den der Verbraucher durch die Nutzung der digitalen Inhalte gespart hat.

5. Hat der Empfänger für die Waren oder digitalen Inhalte Geld- oder Naturalersatz erhalten und war ihm der Grund der Anfechtung oder der Beendigung des Vertrags bekannt oder hätte er ihm bekannt sein müssen, kann die andere Partei wählen, ob sie

den Naturalersatz oder den Geldwert des Naturalersatzes zurückfordert. Hat der Empfänger für die Waren oder digitalen Inhalte Geld- oder Naturalersatz erhalten, ohne dass ihm der Grund der Anfechtung oder der Beendigung bekannt war oder hätte bekannt sein müssen, kann er wählen, ob er den Geldwert des Naturalersatzes oder den Naturalersatz zurückgibt.

6. Bei digitalen Inhalten, die nicht gegen Zahlung eines Preises bereitgestellt wurden, erfolgt keine Rückabwicklung.

Artikel 174
Vergütung der Nutzung und Verzinsung des erhaltenen Geldbetrags

1. Ein Empfänger, der eine Ware genutzt hat, muss der anderen Partei den Geldwert dieser Nutzung für den betreffenden Zeitraum zahlen, wenn

    (a) er selbst die Anfechtung oder die Beendigung des Vertrags zu vertreten hat,

    (b) ihm vor Beginn des Nutzungszeitraums der Anfechtungs- oder Beendigungsgrund bekannt war oder

    (c) es aufgrund der Beschaffenheit der Ware, der Art und des Umfangs ihrer Nutzung und der Verfügbarkeit anderer Abhilfen als der Beendigung des Vertrags unbillig wäre, dem Empfänger die unentgeltliche Nutzung der Ware für diesen Zeitraum zu gestatten.

2. Ein Empfänger, der Geld zurückerstatten muss, muss zu dem in Artikel 166 genannten Satz Zinsen zahlen, wenn

    (a) die andere Partei verpflichtet ist, für die Nutzung zu zahlen, oder

    (b) der Empfänger die Anfechtung des Vertrags wegen arglistiger Täuschung, Drohung und unfairer Ausnutzung zu vertreten hat.

3. Für die Zwecke dieses Kapitels ist ein Empfänger außer in den in den Absätzen 1 und 2 dargelegten Fällen nicht verpflichtet, für die Nutzung einer Ware zu zahlen oder den erhaltenen Geldbetrag zu verzinsen.

Artikel 175
Aufwendungsersatz

1. Hat ein Empfänger im Zusammenhang mit Waren oder digitalen Inhalten Aufwendungen gemacht, hat er Anspruch auf Entschädigung in dem Maße, in dem der anderen Partei dadurch ein Vorteil entstanden ist, vorausgesetzt, die Aufwendungen sind zu einem Zeitpunkt angefallen, als der Empfänger den Grund der Anfechtung oder der Beendigung des Vertrags nicht kannte und auch nicht hätte kennen müssen.

2. Ein Empfänger, der den Grund der Anfechtung oder der Beendigung des Vertrags kannte oder hätte kennen müssen, hat nur insoweit Anspruch auf Entschädigung, als die Aufwendungen im Zusammenhang mit dem Schutz der Waren oder digitalen

Inhalte vor Untergang oder Wertverlust angefallen sind, vorausgesetzt, der Empfänger hatte keine Gelegenheit, sich mit der anderen Partei zu beraten.

Artikel 176
Mögliche Abweichung nach Billigkeitsgesichtspunkten

Eine nach diesem Kapitel bestehende Rückgabe- oder Rückzahlungsverpflichtung kann geändert werden, wenn deren Erfüllung dem Billigkeitsgrundsatz grob zuwiderlaufen würde, wobei insbesondere zu berücksichtigen ist, ob die Partei den Grund der Anfechtung oder der Beendigung des Vertrags zu vertreten hat oder ihn kannte.

Artikel 177
Zwingender Charakter der Vorschriften

Im Verhältnis zwischen einem Unternehmer und einem Verbraucher dürfen die Parteien die Anwendung dieses Kapitels nicht zum Nachteil des Verbrauchers ausschließen, davon abweichen oder dessen Wirkungen abändern.

Teil VIII Verjährung

Kapitel 18 Verjährung

ABSCHNITT 1 ALLGEMEINE BESTIMMUNGEN

Artikel 178
Der Verjährung unterliegende Rechte

Ein Recht, die Erfüllung einer Verpflichtung zu vollstrecken, sowie etwaige Nebenrechte unterliegen der Verjährung durch Ablauf einer Frist nach Maßgabe dieses Kapitels.

ABSCHNITT 2 VERJÄHRUNGSFRISTEN UND FRISTBEGINN

Artikel 179
Verjährungsfristen

1. Die kurze Verjährungsfrist beträgt zwei Jahre.

2. Die lange Verjährungsfrist beträgt zehn Jahre beziehungsweise bei Schadensersatzansprüchen wegen Personenschäden dreißig Jahre.

Artikel 180
Beginn der Verjährungsfristen

1. Die kurze Verjährungsfrist beginnt mit dem Zeitpunkt, zu dem der Gläubiger von den das Recht begründenden Umständen Kenntnis erhielt oder hätte Kenntnis erhalten müssen.

2. Die lange Verjährungsfrist beginnt mit dem Zeitpunkt, zu dem der Schuldner leisten muss, beziehungsweise bei einem Recht auf Schadensersatz mit dem Zeitpunkt, zu dem die das Recht begründende Handlung erfolgte.

3. Hat der Schuldner eine fortdauernde Verpflichtung zu einem Tun oder Unterlassen, so erwächst dem Gläubiger aus jeder Nichterfüllung der Verpflichtung ein gesondertes Recht.

ABSCHNITT 3 VERLÄNGERUNG DER VERJÄHRUNGSFRISTEN

Artikel 181
Hemmung bei gerichtlichen und anderen Verfahren

1. Beide Verjährungsfristen sind von dem Zeitpunkt an gehemmt, zu dem ein gerichtliches Verfahren zur Durchsetzung des Rechts eingeleitet wird.

2. Die Hemmung dauert an, bis rechtskräftig entschieden worden ist oder der Rechtsstreit anderweitig beigelegt wurde. Endet das Verfahren innerhalb der letzten sechs Monate der Verjährungsfrist ohne Entscheidung in der Sache, endet die Verjährungsfrist nicht vor Ablauf von sechs Monaten nach Beendigung des Verfahrens.

3. Die Absätze 1 und 2 gelten entsprechend auch für Schiedsverfahren, für Mediationsverfahren, für Verfahren, in denen die abschließende Entscheidung über eine Streitfrage zweier Parteien einer dritten Partei überlassen wird, sowie für alle Verfahren, deren Ziel es ist, über das Recht zu befinden oder eine Insolvenz abzuwenden.

4. Mediation bezeichnet unabhängig von ihrer Benennung ein geordnetes Verfahren, in dem zwei oder mehrere Streitparteien mit Hilfe eines Mediators auf freiwilliger Basis selbst versuchen, eine Vereinbarung über die Beilegung ihrer Streitigkeiten zu erzielen. Das Verfahren kann von den Parteien eingeleitet, von einem Gericht angeregt oder angeordnet werden oder nach innerstaatlichem Recht vorgeschrieben sein. Die Mediation endet mit der Einigung der Parteien oder mit einer Erklärung des Mediators oder einer der Parteien.

Artikel 182
Ablaufhemmung bei Verhandlungen

Verhandeln die Parteien über das Recht oder über Umstände, die einen Anspruch hinsichtlich des Rechts begründen könnten, so enden beide Verjährungsfristen nicht vor Ablauf eines Jahres, nachdem die letzte Mitteilung im Rahmen der Verhandlungen erfolgt ist oder nachdem eine der Parteien der anderen Partei mitgeteilt hat, dass sie die Verhandlungen nicht fortsetzen möchte.

Artikel 183
Ablaufhemmung bei fehlender Geschäftsfähigkeit

Ist eine geschäftsunfähige Person ohne gesetzlichen Vertreter, enden die beiden Verjährungsfristen nicht vor Ablauf eines Jahres, nachdem die Person entweder geschäftsfähig geworden ist oder ein Vertreter bestellt wurde.

ABSCHNITT 4 NEUBEGINN DER VERJÄHRUNGSFRISTEN

Artikel 184
Neubeginn infolge Anerkenntnis

Erkennt der Schuldner das Recht gegenüber dem Gläubiger durch Teilzahlung, Zahlung von Zinsen, Leistung einer Sicherheit, Aufrechnung oder in anderer Weise an, so beginnt eine neue kurze Verjährungsfrist.

ABSCHNITT 5 WIRKUNG DER VERJÄHRUNG

Artikel 185
Wirkung der Verjährung

1. Nach Ablauf der geltenden Verjährungsfrist ist der Schuldner berechtigt, die Erfüllung der betreffenden Verpflichtung zu verweigern, während der Gläubiger alle ihm wegen Nichterfüllung zustehenden Abhilfen verliert mit Ausnahme des Rechts, seine Leistung zurückzuhalten.
2. Was immer der Schuldner in Erfüllung der betreffenden Verpflichtung gezahlt oder übertragen hat, kann nicht allein deshalb zurückgefordert werden, weil die Leistung zu einem Zeitpunkt erbracht wurde, zu dem die Verjährungsfrist abgelaufen war.
3. Die Verjährung eines Rechts auf Zinsen und anderen Nebenrechten tritt spätestens mit der Verjährung des Hauptrechts ein.

ABSCHNITT 6 EINVERNEHMLICHE ÄNDERUNG

Artikel 186
Vereinbarungen über die Verjährung

1. Die Vorschriften dieses Kapitels können von den Parteien einvernehmlich geändert werden, vor allem durch Verkürzung oder Verlängerung der Verjährungsfristen.
2. Die kurze Verjährungsfrist darf auf höchstens ein Jahr verkürzt und auf höchstens zehn Jahre verlängert werden.
3. Die lange Verjährungsfrist darf auf höchstens ein Jahr verkürzt und auf höchstens dreißig Jahre verlängert werden.
4. Die Parteien dürfen die Anwendung dieses Artikels nicht ausschließen, davon abweichen oder dessen Wirkungen abändern.
5. Bei einem Vertrag zwischen einem Unternehmer und einem Verbraucher darf dieser Artikel nicht zum Nachteil des Verbrauchers angewandt werden.

Anlage 1

Muster-Widerrufsbelehrung

Widerrufsrecht

Sie haben das Recht, diesen Vertrag binnen vierzehn Tagen ohne Angabe von Gründen zu widerrufen.

Die Widerrufsfrist beträgt vierzehn Tage ab dem Tag 1.

Um Ihr Widerrufsrecht auszuüben, müssen Sie uns gegenüber [2] unmissverständlich erklären (z.B. per Postbrief, Fax oder E-Mail), dass Sie den Vertrag widerrufen möchten. Sie können dafür das beigefügte Standard-Widerrufsformular verwenden, dessen Gebrauch jedoch nicht zwingend ist. [3]

Zur Einhaltung der Widerrufsfrist genügt es, dass Sie Ihre Widerrufserklärung vor Ablauf der Widerrufsfrist absenden.

Wirkungen des Widerrufs

Wenn Sie diesen Vertrag widerrufen, erstatten wir Ihnen alle von Ihnen geleistete Zahlungen einschließlich der Lieferkosten (mit Ausnahme der zusätzlichen Kosten, die sich daraus ergeben, dass Sie eine andere Art der Lieferung als die von uns angebotene, günstigste Standardlieferung gewählt haben) unverzüglich, spätestens jedoch binnen 14 Tagen ab dem Tag, an dem wir Kenntnis von Ihrem Widerruf erhalten haben, zurück. Die Erstattung erfolgt unter Verwendung desselben Zahlungsmittels, das Sie für die ursprüngliche Transaktion verwendet haben, es sei denn, es wurde ausdrücklich etwas anderes vereinbart. Für Sie fallen dadurch jedoch keine Gebühren an. [4]





Hinweise zum Ausfüllen des Formulars:

[1] Fügen Sie an dieser Stelle einen der folgenden in Anführungszeichen gesetzten Textbausteine ein:

a) im Falle eines Vertrags über verbundene Dienstleistungen oder eines Vertrags über die Lieferung von Wasser, Gas oder Strom, wenn sie nicht in einem begrenzten Volumen oder in einer bestimmten Menge zum Verkauf angeboten werden, von Fernwärme oder von digitalen Inhalten, die nicht auf einem materiellen Datenträger geliefert werden: „des Vertragsschlusses.“;

b) bei Kaufverträgen: „ , an dem Sie oder ein von Ihnen benannter Dritter, der nicht der Beförderer ist, die Waren in Empfang genommen hat.“;

c) Bei einem Vertrag über den Kauf mehrerer Waren, die der Verbraucher gleichzeitig bestellt hat und die getrennt geliefert werden: „ , an dem Sie oder ein von Ihnen benannter Dritter, der nicht der Beförderer ist, die letzte Ware in Empfang genommen hat.“;

d) bei einem Vertrag über die Lieferung einer Ware in mehreren Teilsendungen oder Stücken: „ , an dem Sie oder ein von Ihnen benannter Dritter, der nicht der Beförderer ist, die letzte Teilsendung oder das letzte Stück in Empfang genommen hat.“;

e) bei einem Vertrag über die regelmäßige Lieferung von Waren über einen bestimmten Zeitraum hinweg: „ , an dem Sie oder ein von Ihnen benannter Dritter, der nicht der Beförderer ist, die erste Lieferung in Empfang genommen hat.“

2 Fügen Sie Ihren Namen, Ihre Anschrift sowie ggf. Ihre Telefon- und Faxnummer und Ihre E-Mail-Adresse ein.

3 Wenn der Widerruf auch elektronisch auf Ihrer Website eingegeben werden kann, ist Folgendes einzufügen: „Über unser Internetportal [Internet-Adresse einfügen] können Sie das Standard-Widerrufsformular auch elektronisch ausfüllen und übermitteln oder auf elektronischem Weg eine eindeutige Widerrufserklärung abgeben. Wenn Sie sich für diese Option entscheiden, erhalten Sie umgehend eine Empfangsbestätigung des Widerrufs auf einem dauerhaften Datenträger (z. B. per E-Mail).“

4 Wenn Sie bei einem Kaufvertrag im Falle des Widerrufs keine Abholung der Ware angeboten haben, ist folgender Satz einzufügen: „Wir behalten uns vor, den Kaufpreis so lange zurückzuhalten, bis wir die Ware wieder in Empfang genommen haben oder Sie den Nachweis ihrer Rücksendung erbracht haben, je nachdem, welches Ereignis früher eintritt.“

5 Wurden in Verbindung mit dem Vertrag Waren geliefert, ist je nach Fall Folgendes einzufügen:

a:

– „Die Ware wird von uns abgeholt.“ oder

– „Sie haben die Ware unverzüglich, spätestens jedoch binnen 14 Tagen ab dem Tag, an dem Sie uns den Widerruf mitgeteilt haben, an uns oder an _____ [hier sind ggf. der Name und die Postanschrift der von Ihnen zur Entgegennahme der Ware autorisierten Person anzugeben] zurückzusenden oder zu übergeben. Die Frist gilt als eingehalten, wenn die Ware vor Ablauf der 14-tägigen Frist abgesandt wurde.“

b:

– „Die Kosten der Rücksendung gehen zu unseren Lasten.“ oder

– „Die direkten Kosten der Rücksendung gehen zu Ihren Lasten.“ oder

– bei einem Fernabsatzvertrag, in dem Sie keine Kostenübernahme für die Rücksendung der Ware anbieten und die Ware ihrem Wesen nach nicht normal per Post zurückgeschickt werden kann: „Die direkten Kosten der Rücksendung – ___EUR – [Betrag eingeben] gehen zu Ihren Lasten." Oder wenn eine genaue vorherige Berechnung der Kosten in vernünftigem Rahmen nicht möglich ist: „Die direkten Kosten der Rücksendung gehen zu Ihren Lasten. Die Kosten werden auf höchstens etwa ___ EUR [Betrag einfügen] geschätzt." oder

– wenn bei einem außerhalb von Geschäftsräumen geschlossenen Vertrag die Ware ihrem Wesen nach nicht normal mit der Post zurückgesandt werden kann und dem Verbraucher bei Vertragsschluss ins Haus geliefert worden ist: „Die Ware wird auf unsere Kosten abgeholt."

c „Sie haften für einen etwaigen Wertverlust der Ware nur dann, wenn dieser Wertverlust auf einen für die Feststellung der Art, Beschaffenheit und Funktionstüchtigkeit der Ware nicht notwendigen Umgang mit ihr zurückzuführen ist."

6 Bei einem Vertrag über verbundene Dienstleistungen ist folgender Satz einzufügen: „Wurde auf Ihren Wunsch hin noch während der Widerrufsfrist mit der Erbringung der verbundenen Dienstleistungen begonnen, schulden Sie uns bezogen auf das Gesamtauftragsvolumen den Betrag, der dem Anteil entspricht, der bis zu Ihrem Widerruf bereits geleistet wurde."

Anlage 2

Standard-Widerrufsformular

(Nur auszufüllen und zurückzusenden, wenn Sie vom Ihrem Widerrufsrecht Gebrauch machen möchten)

– An [Name, Anschrift sowie ggf. Faxnummer und E-Mail-Adresse des Unternehmers – vom Unternehmer einzutragen]

– Hiermit widerrufe(n) ich/wir* den von mir/uns* abgeschlossenen Vertrag über den Kauf der folgenden Waren*/die Bereitstellung der folgenden digitalen Inhalte/die Erbringung der folgenden verbundenen Dienstleistung*:

– Bestellt am*/erhalten am*

– Name des/der Verbraucher(s)

– Anschrift des/der Verbraucher(s)

– Unterschrift des/der Verbraucher(s) (nur bei Übermittlung dieses Formulars auf Papier)

– Datum

* Unzutreffendes streichen.

ANHANG II
STANDARD-INFORMATIONSBLATT

Sie sind dabei, einen Vertrag auf der Grundlage des Gemeinsamen Europäischen Kaufrechts abzuschließen, das den Verbrauchern bei Verträgen mit länderübergreifendem Bezug als Alternative zum nationalen Vertragsrecht zur Verfügung steht. Das Gemeinsame Europäische Kaufrecht gilt in der ganzen Europäischen Union und gewährleistet ein hohes Maß an Verbraucherschutz.

Die Bestimmungen des Gemeinsamen Europäischen Kaufrechts finden auf den Vertrag nur mit Ihrer ausdrücklichen Einwilligung Anwendung.

Sollten Sie telefonisch oder auf andere Weise (z. B. per SMS) einem Vertrag zugestimmt haben und konnten deshalb von diesem Informationsblatt keine Kenntnis nehmen, wird der Vertrag erst gültig, nachdem Sie dieses Informationsblatt erhalten und Ihre Einwilligung bestätigt haben.

Ihre wichtigsten Rechte sind nachstehend beschrieben.

DAS GEMEINSAME EUROPÄISCHE KAUFRECHT: KURZDARSTELLUNG DER WICHTIGSTEN VERBRAUCHERRECHTE

Ihre Rechte vor Unterzeichnung des Vertrags

Der Verkäufer muss Sie über die wesentlichen **Vertragsdetails informieren**, zum Beispiel über die Ware und den Preis (inklusive aller Abgaben und sonstigen Kosten), und Ihnen seine Kontaktangaben mitteilen. Die Informationen müssen besonders ausführlich sein, wenn Sie etwas außerhalb der Geschäftsräume des Verkäufers kaufen oder den Verkäufer überhaupt nicht zu Gesicht bekommen, zum Beispiel bei einem Kauf im Internet oder per Telefon. Bei unvollständigen oder Falschangaben haben Sie Anspruch auf Schadensersatz.

Ihre Rechte nach Unterzeichnung des Vertrags

In den meisten Fällen haben Sie 14 Tage Zeit, um **den Kauf zu widerrufen**, wenn Sie die Waren außerhalb der Geschäftsräume des Verkäufers erworben oder diesen bis zum Zeitpunkt des Kaufs gar nicht getroffen haben (beispielsweise bei einem Kauf im Internet oder per Telefon). Der Verkäufer muss Sie darüber informieren und dafür sorgen, dass Sie das Standard-**Widerrufsformular**[23] erhalten. Hat er dies versäumt, können Sie den Vertrag innerhalb eines Jahres widerrufen.

Was können Sie tun, wenn Produkte fehlerhaft sind oder nicht wie vereinbart geliefert wurden? Sie haben die Wahl zwischen 1) Lieferung 2) Ersatz oder 3) Reparatur der Ware 4) Minderung, d. h. sie verlangen einen Preisnachlass, 5) Rücktritt vom Vertrag, d. h. Sie geben das Produkt zurück und lassen sich das Geld erstatten, es sei denn, der Mangel ist sehr gering, 6) Schadensersatz. Den Preis müssen Sie erst zahlen, wenn Sie ein fehlerfreies Produkt erhalten haben.

Wurde eine verbundene *Dienstleistung* nicht so erbracht hat wie im Vertrag zugesagt, haben Sie ähnliche Rechte. Nachdem Sie sich beschwert haben, hat der Dienstleister jedoch

[23] [Entsprechenden Link einfügen]

normalerweise zunächst das Recht zu versuchen, seinen Auftrag ordnungsgemäß auszuführen. Erst wenn ihm dies wieder nicht gelingt, können Sie wählen: 1) Sie fordern den Dienstleister noch einmal auf, die verbundene Dienstleistung zu erbringen. 2) Sie zahlen erst, wenn die Dienstleistung ordnungsgemäß erbracht worden ist. 3) Sie verlangen einen Preisnachlass. 4) Sie verlangen Schadensersatz. 5) Sie treten vom Vertrag zurück und lassen sich das Geld erstatten, es sei denn, das Versäumnis bei der Erbringung der Dienstleistung ist sehr gering. **Frist für die Geltendmachung Ihrer Rechte, wenn Produkte fehlerhaft sind oder nicht wie vereinbart geliefert wurden:** Nachdem Sie festgestellt haben oder hätten feststellen müssen, dass der Verkäufer oder Dienstleister eine vertraglich vereinbarte Leistung nicht vertragsgemäß erbracht hat, haben Sie 2 Jahre Zeit, um Ihre Rechte geltend zu machen. Tritt das Versäumnis erst sehr spät zutage, ist der letztmögliche Zeitpunkt, zu dem Sie Ihre Ansprüche anmelden können, 10 Jahre nach dem Zeitpunkt, zu dem der Verkäufer oder Dienstleister die Waren liefern beziehungsweise die digitalen Inhalte bereitstellen oder die verbundene Dienstleistung erbringen musste.

Schutz vor unfairen Bestimmungen: Unfaire Standardvertragsbestimmungen sind für Sie rechtlich nicht verbindlich.

Ihre Rechte wurden hier nur kurz dargestellt; die Aufzählung ist daher weder erschöpfend noch geht sie sehr ins Detail. Den vollständigen Text des Gemeinsamen Europäischen Kaufrechts finden Sie hier. Lesen Sie Ihren Vertrag bitte sorgfältig durch.

Im Streitfall ist eine rechtliche Beratung zu empfehlen.



COUNCIL OF THE EUROPEAN UNION

Brussels, 13 October 2011

Interinstitutional File: 2011/0284 (COD)

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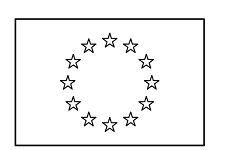
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COVER NOTE

from:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	12 October 2011
to:	Mr Pierre de BOISSIEU, Secretary-General of the Council of the European Union
Subject:	COMMISSION STAFF WORKING PAPER Executive summary of the Impact Assessment *Accompanying the document* Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law

Delegations will find attached Commission document SEC(2011) 1166 final.

Encl.: SEC(2011) 1166 final



EUROPEAN COMMISSION

Brussels, 11.10.2011
SEC(2011) 1166 final

COMMISSION STAFF WORKING PAPER

Executive summary of the Impact Assessment

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

on a Common European Sales Law

{COM(2011) 635 final}
{SEC(2011) 1165 final}

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

The European Commission (Commission) has been working on a European contract law since 2001. In July 2010 the Commission adopted a 'Green Paper on policy options on progress towards a European contract law for consumers and businesses' (Green Paper). The Commission's Work Programme for 2011 provides for a legal instrument on European contract law as a strategic initiative to be proposed in the last quarter of 2011.

In April 2010 the Commission set up an Expert Group (EG) to conduct a feasibility study on a draft instrument. The study was completed in April 2011. An Impact Assessment Steering Group met 5 times to discuss the draft Green Paper, the impact assessment (IA) report and the feasibility study.

The Commission carried out continuous consultations. The Green Paper resulted in 320 responses of a wide range of stakeholders. They allowed the Commission to identify and address concerns relating to the policy options. The Commission also created a key stakeholders expert group representing business, consumers and legal practitioners. It was consulted continuously on the feasibility study to ensure its rules were covering all practical problems and were user-friendly. In addition, the Commission also surveyed business and consumers through Eurobarometers (EB), the SME Panel and the European Business Test Panel surveys. A workshop on contract law with business stakeholders was organised in November 2010. Commission officials also met representatives of BEUC and attended two meetings of the European Consumer Consultative Group (ECCG).

2. PROBLEM DEFINITION

2.1. Introduction

Differences in contract law between Member States (MS) may hinder cross-border trade in the EU, by dissuading business and consumers from cross-border transactions. Businesses involved in the trade in goods that export into other EU markets face unnecessary entry transaction costs close to €1 billion (bn) every year. The value of the trade foregone by those who are dissuaded due to differences in contract law amounts to some tens of billions of euros.

2.2. Current EU legal framework in the area of contract law

The current legal framework in the area of contract law is characterised by differences between the national laws. While a number of EU and international legal instruments have been adopted in the area of contract law, there is no uniform and comprehensive set of rules that businesses and consumers could use in cross-border transactions in the EU.

2.3. Problem 1: Differences in contract law hinder businesses from cross border trade and limit their cross-border operations

Currently on average only 9.3% of all EU businesses involved in trade in goods export within the EU.. The majority of them (62% in B2B and 57% in B2C) export to no more than 3 other MS. One of the reasons for this relatively low level of cross-border trade are the remaining regulatory (e.g. differences in tax regulations, contract law and administrative requirements) and practical barriers (e.g. language, transportation and after-sales maintenance) to cross-border trade.

Negative impact of contract law differences on cross-border trade: Contract law related barriers dissuade some businesses from trading cross-border. 61% of businesses involved in B2B and 55% in B2C transactions were often or at least occasionally deterred by contract law related barriers. Additionally, 3% of respondents in the business-to-business (B2B) and 2% in the business-to-consumer (B2C) EBs always gave up exports for this reason. Secondly, contract law related barriers lead businesses to limit their cross-border operations: Above 80% (both in B2B and B2C transactions) of businesses active in or interested in cross-border trade and affected by contract law barriers suggested that they exported to fewer EU countries for this reason. The value of failed intra-EU trade as a result of businesses giving up cross-border trade due to contract law can be estimated at a range between €26 bn (equivalent to the GDP of Lithuania) to €184 bn (slightly more than the GDP of Portugal).

Research suggests that bilateral trade between countries which have a legal system based on a common origin have a positive effect on trade. If the contribution of removing differences in contract law were to be about 1 percentage point of this positive effect, the increase in intra-EU trade would be of the order of magnitude of €30 bn.

2.3.1. Additional transaction costs stemming from differences in contract law hinder cross-border trade: The need to apply different foreign contract laws generates additional transaction costs compared to domestic trade. These costs usually grow proportionately to the number of EU countries a business trades with. Businesses estimate their transaction costs for entering one MS between less than €1,000 to above €30,000. These costs have the greatest impact on micro and small enterprises, as they constitute a greater share of their turnover.

2.3.2.

The cumulative costs for all currently exporting EU businesses are between €6 and €13 bn. The annual transaction costs amount to approximately €0.9-€1.9 bn. In the absence of action, by the year 2020 they would accumulate to €9-€19 bn if the same level of export entry persists.

2.3.3. Perceived increased legal complexity hinders cross-border trade: The perception of legal complexity is an additional factor affecting the decision to start cross-border trade. Businesses considered for instance the difficulty in finding out the foreign contract law provisions a top barrier. It ranked 1st for B2C and 3rd for B2B transactions.

2.4. Problem 2: Consumers are hindered from cross-border purchases and miss opportunities

The level of cross-border shopping in the EU remains relatively low with 26% of consumers purchasing from another EU country when they travel and 9% from a distance. Barriers on the supply and demand side appear to hinder this growth. While the impact of practical barriers is gradually decreasing, the importance of the regulatory ones remains high.

2.4.1. Contract law differences impact negatively on cross-border shopping:

Contract law includes rules protecting consumers. The certainty about the content of these rules is a major factor determining consumer confidence in cross-border shopping. When consumers are confronted with different foreign laws, they are uncertain about their rights in a cross-border context. Indeed, 44% of European consumers say that uncertainty about their consumer rights discouraged them from purchasing from other EU countries.

2.4.2. Consumers miss out opportunities of the single market:

A substantial number of consumers who prefer to shop domestically due to uncertainty about their cross-border rights, are often disadvantaged by the limited choice and higher prices in their domestic markets. If the 44% of consumers who shop online only domestically and who are uncertain about their cross-border rights, would make at least one online cross-border purchase, they could save €380 million.

On the other hand, consumers who try to access better offers in other MS are often refused a purchase by the trader. Almost a quarter of export-oriented European retailers refused to sell due to contract law. The refusal of sales may dissuade proactive consumers from shopping cross-border and disadvantages them economically. European consumers spend €42.3 bn annually on cross-border purchases. Assuming that within a year the 3 million consumers who experienced a refusal to sell were refused an order of a product of an average value of €52, the value of failed transactions would be €156 million.

2.5. Need for action at EU level and subsidiarity

This initiative complies with the principle of subsidiarity. The objectives of facilitating the expansion of cross-border trade for business and purchases by consumers in the internal market cannot be fully achieved as long as differences in national contract laws persist. As market trends evolve and prompt MS to take action independently (e.g. regulating digital content products) regulatory divergences lead to increased transaction costs and legal complexity for business; gaps in the protection of consumers risk growth. National contract laws can only be approximated by adopting measures at EU level. The Union is best placed to address the problems outlined above as they have a clear cross-border dimension.

3. POLICY OBJECTIVES

The overall objective is to support the economic activity in the internal market by improving the conditions for cross-border trade by reducing the barriers caused by differences in contract law between MS. The general objectives are to facilitate the expansion of cross-border trade for business and cross-border purchases for consumers.

4. POLICY OPTIONS

4.1. Options for type of intervention

Option 1: Baseline scenario (No policy change): The current legal framework would be maintained without further EU action.

Option 2: A toolbox for the EU legislator: This would set out model definitions and rules on contract law topics that are likely to be subject to EU legislation. A Commission document or an inter-institutional agreement could be envisaged.

Option 3: Recommendation onCommon European Sales Law: A Common European Sales Law instrument could be attached to a Recommendation addressed to the MS encouraging them to replace (option 3a) or incorporate (option 3b) it into their national laws voluntarily, allowing them discretion on time, method and extent of implementation. This option may induce MS to replace their national contract laws or let them incorporate a Common European Sales Law instrument as an optional regime.

Option 4: Regulation or Directive setting up an optional Common European Sales Law instrument: An optional Common European Sales Law could be set up as a 'second regime' within each Member State's national civil law. It would be a comprehensive, self-standing set of contract law rules with a high level of consumer protection, which could be chosen by the parties as the law applicable to their cross-border contracts.

Option 5a and 5b: Directive on a mandatory Common European Sales Law: A Directive could harmonise the national contract laws of the 27 MS. It would complement the consumer acquis and would be based on a high level of consumer protection. The harmonisation may be full (5a) or minimal (5b).

Option 6: Regulation establishing a mandatory Common European Sales Law: This would create a uniform set of EU contract law rules in all MS.

Option 7: Regulation establishing a European Civil Code: This would create a uniform set of European civil law rules in all MS.

Discarded options:

- Option 3a: Recommendation encouraging MS to replace national laws.
- Option 7: Regulation establishing a European Civil Code.

These options received hardly any support from stakeholders and are likely to go beyond what is necessary and thus be disproportionate. They also raise serious issues of not meeting the principle of subsidiarity.

4.2. Options for scope and content

The scope of a Common European Sales Law instrument could apply only to cross-border transactions or to both domestic and cross-border transactions. The scope could include B2C contracts only or also B2B contracts. A narrow substantive content of the instrument would be limited to core areas of general contract law. A broad scope could go beyond by including specific areas in contract law, such as service contracts and other areas of law, such as non-contractual liability.

This impact assessment analyses a combination of the narrow and broad scope areas. It covers the vast majority of usual practical problems within the lifecycle of a cross-border contract. The analysis focuses on the impacts of substantive provisions which impact upon consumers and businesses.

5. ANALYSIS OF IMPACTS

5.1. Main impacts of policy option 1: Baseline Scenario

The baseline scenario (BS) would not remove the additional transaction costs or reduce the level of legal complexity for businesses who wish to trade cross-border. Competition in the internal market would remain limited, and despite the adoption of the Consumer Rights Directive divergences between the consumer protection rules of different MS would remain.

5.2. Main impacts of policy option 2

5.2.1. 2a: Toolbox as a Commission Document

The toolbox would be used for the amendment of existing or preparation of future sectoral legislation. Therefore, compared to the BS, the positive impacts of this option on business and

consumers would be indirect and also very limited. Moreover, any impacts of this option would not be felt immediately as negotiations for new legislation or amendments to existing legislation would take time to achieve. As there is no way of knowing whether and how widely this option would be used and accepted by the Council and Parliament, the impacts of this option would not really differ compared to the BS.

5.2.2. 2b: Toolbox as an inter-institutional agreement

Compared to option 2a, the only difference in this option is that in the negotiations for new legislation or amendments to existing legislation Council and Parliament would make use of the toolbox provided there were no overriding sector-specific reasons. However, as this option would only concern national contract law rules which would be modified following revised or new EU legislation, costs stemming from differences of national contract laws would largely remain. In addition, this option would only have an impact at the earliest in the medium term. The overall positive impact of this option would therefore be, albeit greater than option 2a, still rather limited.

5.3. Main impacts of policy option 3: Recommendation on a Common European Sales Law

This option would only be effective if the Common European Sales Law was incorporated by a number of MS entirely and without amendment to the original version attached to the Recommendation. However, this is highly unlikely. This option would help to a certain extent traders in a B2B contract (as they would have the freedom to decide on the law applicable to their contract). Therefore these traders would have the opportunity to reduce their transaction costs by using the Common European Sales Law of one MS which has best implemented it. The same would not be the case for traders in B2C contracts, as they would have to research whether and where MS have changed the Common European Sales Law with regards to mandatory consumer protection rules. This means that they would not be able to sell across borders to consumers on the basis of one single law and would therefore incur transaction costs of the type indicated in the BS. Consequently this option would only to a limited extent remove the hindrances to cross-border trade identified in the problem definition.

5.4. Main impacts of policy option 4: Regulation/Directive setting up an optional Common European Sales Law

This option would significantly reduce transaction costs because it would allow businesses to use one set of rules for cross border trade irrespective of the number of countries they trade with in the EU. The decrease in costs would provide incentives to increase trade which would result in more competition in the internal market and give consumers more product choice at a lower price.

If a business used the optional Common European Sales Law, administrative costs would amount to €3,000 for B2C contracts and to €1,500 for B2B contracts (on average per enterprise). Assuming that initially 25% of current exporters decide to use the optional Common European Sales Law, one-off implementation costs would amount to €1.89 billion. These costs would be however by far outweighed by the savings which would be made from businesses not paying the additional transaction costs for when they trade with more than one MS. This option would result in costs savings for new exporters and potential savings by current exporters which would expand their cross-border sales to new countries. The annual savings for new exporters can be estimated at €150-€400 million while the potential savings

for current exporters could be estimated at €3.7-€4.3 billion. Domestic businesses or those which do not choose the optional Common European Sales Law would not face any costs as this option would not affect them.

This policy option meets the policy objectives as it reduces costs for businesses and offers a less complex legal environment for those who wish to trade cross border to more than one MS. At the same time it provides a high level of consumer protection.

5.5. Main impacts of policy options 5 and 6

5.5.1. Policy option 5a: full harmonisation Directive on a mandatory Common European Sales Law and policy option 6: Regulation establishing a mandatory Common European Sales Law

Compared to the BS, an instrument under these options would have substantial costs attached to it. The instrument would weigh particularly heavily on SMEs. Businesses which only trade domestically would face a very substantial cost to use the new instrument without an added value. These businesses (17,136,213 in B2B and 4,420,563 in B2C) would face a one-off implementation cost of €208.8 billion to use the new legislation.

The instrument would create additional administrative costs for 22 million businesses, i.e. including those who trade only domestically, which would amount on average per enterprise to €2,500 in B2C transactions and to €1,500 in B2B transactions. The businesses trading only domestically would be required to pay these costs with no real financial gain, as this advantage would only be realised for those businesses trading across a border. The one-off transactions costs for 22 million businesses (including for those who trade only domestically) in the EU would amount to €217 billion.

However, the instrument would result in cost savings for new exporters as well as current exporters who would expand their cross-border sales to new countries. The annual savings for new exporters would be €0.63-€1.6 billion. Similarly as under option 4, the current exporters that would start trading with additional countries could be estimated to have potential savings of at least €3.7 – €4.3 billion.

The instrument would increase competition in the internal market and lead to a decrease in prices. Consumers would benefit from an increased choice of products at a lower price. Although the instrument would provide a high level of consumer protection, the replacing of national legislation could mean that some consumers may lose protection in some specific cases compared to their existing national law.

MS would be likely to find these options politically very difficult to agree and to implement as they would eliminate domestic laws and legal traditions. Although the instrument would harmonise existing contract law legislation and eliminate transaction costs, it would create other substantive disadvantages which would not only be of monetary value. Therefore taking these and the monetary costs into account they outweigh by far the benefits of the instrument.

5.5.2. Policy option 5b: A minimum harmonisation Directive on a Common European Sales Law

MS could implement this Directive going beyond its consumer protection level. As experience with existing minimum harmonisation Directives shows, the level of

implementation could maintain a considerable number of differences in national contract laws. This option would to a certain extent reduce transaction costs and increase the level of consumer protection allowing consumers to have more confidence to purchase across borders.

However, as set out in options 5a and 6, there would be a very substantial one-off cost borne by domestic and cross border traders as they would have to adapt their contracts to use the new law. This cost would affect all businesses involved in the trade in goods, irrespective of their desire to trade cross-border. In addition, due to the nature of minimum harmonisation, there would still be some extra costs for businesses when trading cross border to consumers arising from the necessity to research the levels of consumer protection in other MS. Therefore, whilst there may be a worthwhile investment for B2B cross border transactions, those performing B2C cross-border contracts as well as trading only domestically would have to pay very substantial additional costs without a clear added value.

6. COMPARATIVE ASSESSMENT OF OPTIONS

The comparative assessment shows that that option 4 (an optional Common European Sales Law), 5a (full harmonisation Directive on a mandatory Common European Sales Law) and option 6 (Regulation establishing a mandatory Common European Sales Law) best meet the policy objectives. However, the costs attached to options 5a and 6 are significant when compared to the other options because all businesses involved in the trade in goods in the EU would need to adapt to a new legislative framework. In particular, they would create a financial burden which will not be compensated by any benefits for the businesses who only trade domestically and for whom cross border transactions costs do not create a problem. Therefore this is not a proportionate measure for the reduction of the contract law related obstacles to cross-border trade. Options 5a and 6 also have little support from MS.

The **preferred policy option** is therefore option 4 which would meet the policy objectives in terms of reducing legal complexity and transaction costs. Exporters who decide to use the optional Common European Sales Law would initially face certain transaction costs. However, this option would be chosen voluntarily by businesses. To businesses starting or extending their trade cross-border it would bring significant costs savings. Businesses trading domestically or those who decide not to use the optional Common European Sales Law when exporting would not face any costs as this option would not affect them.

This option would also ensure a high level of consumer protection which would increase consumer certainty and confidence about rights in cross-border shopping. It would contribute to the cross-border trade and competitiveness of the EU economy and would benefit the consumer by greater choice of products and better prices. As this option would be chosen voluntarily by businesses, it would not impose additional burdens but bring significant cost savings for businesses extending their trade cross-border.

7. MONITORING AND EVALUATION ARRANGEMENTS

The Commission will launch a monitoring and evaluation exercise to assess how effectively the Common European Sales Law will achieve its objectives. This exercise will take place 4 years after the date of application of the instrument. The intention is for the exercise to precede and feed into a review process which will examine the effectiveness of the Common European Sales Lawinstrument.

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